Supreme Court, U.S.
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No. 04 14

IN THE

Supreme Court of the United States

AIR LIQUIDE AMERICA L.P., *et al.*,

Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS and
PORT OF HOUSTON AUTHORITY OF
HARRIS COUNTY, TEXAS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Fifth Circuit violate the Water Resources Development Act of 1986 ("WRDA-86") by allowing the U.S. Army Corps of Engineers to impose substantial non-federal costs for a federal-state navigation project on private pipeline owners?

2. Did the Fifth Circuit improperly defer to an application of WRDA-86 adopted by the U.S. Army Corps of Engineers to thwart congressional intent that allocation of non-federal costs between the Port of Houston and private pipeline owners should be determined by state law?

LIST OF PARTIES

The petitioners are Air Liquide America L.P., f/k/a Air Liquide America Corporation; Chevron Phillips Chemical Company LP, f/k/a Chevron Chemical Company LLC; Chevron Pipe Line Company d/b/a ChevronTexaco Pipeline Company; EGP Fuels Company; Shell Pipeline Company LP, f/k/a Equilon Pipeline Company LLC; Florida Gas Transmission Company; Houston Pipe Line Company LP, f/k/a Houston Pipe Line Company; HSC Pipeline Partnership, L.P.; Seadrift Pipeline Corporation; TEPPCO Crude Oil, L.P., f/k/a TEPPCO Crude Oil, LLC; TE Products Pipeline Company, Limited Partnership; Texas Eastern Transmission, LP, f/k/a Texas Eastern Transmission Corporation; UCAR Pipeline Incorporated; Black Marlin Pipeline Company; Kinder Morgan Tejas Pipeline, L.P., f/k/a Tejas South Pipeline Partnership; and Kinder Morgan Tejas Pipeline, L.P., f/k/a Tejas Ship Channel, LLC.

The respondents are the U.S. Army Corps of Engineers and the Port of Houston Authority of Harris County, Texas.

Dynegy Midstream Services, Limited Partnership, ExxonMobil Pipeline Company f/k/a Exxon Pipeline Company, Air Products, L.P. f/k/a Air Products, Incorporated, and Air Products Manufacturing Corporation were appellees below; they are not among the petitioners and therefore are identified as respondents in this petition.

DISCLOSURE STATEMENT FOR CORPORATE PETITIONERS

Petitioner Chevron Pipe Line Company d/b/a ChevronTexaco Pipeline Company is wholly owned by ChevronTexaco Global Energy Inc., an indirect subsidiary of Texaco Inc. and ChevronTexaco Corporation.

Petitioner EGP Fuels Company is wholly owned by Enron Corp.

Petitioner Florida Gas Transmission Company is wholly owned by Citrus Corp.

Petitioner Seadrift Pipeline Corporation is wholly owned by Union Carbide Corporation.

Petitioner UCAR Pipeline Incorporated is wholly owned by Union Carbide Corporation.

Petitioner Black Marlin Pipeline Company is wholly owned by Williams Field Services Group, Inc.

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This petition seeks a writ of certiorari to review a decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The trial court's opinion on summary judgment is unpublished. The trial court's opinion and judgment were entered in Civil Action No. H-98-3982, *Air Liquide America Corp., et al. v. U.S. Army Corps of Engineers, et al.*, in the United States District Court for the Southern District of Texas, Houston Division. *See* Pet. App. at 18a-27a.[1]

The court of appeals' opinion is published as *Air Liquide America Corp. v. U.S. Army Corps of Engineers*, 359 F.3d 358 (5th Cir. 2004). *See* Pet. App. at 1a-17a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was entered on January 30, 2004. A petition for rehearing en banc was timely filed. The petition was denied on April 1, 2004. *See* Pet. App. at 30a-31a.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

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1. The record on appeal consists of multiple bound volumes of pleadings prepared and sequentially numbered by the district court clerk. The record is cited in this petition as "__R.__," citing first by volume and then by page. The appendix to the petition for writ of certiorari is cited as "Pet. App."

STATUTORY PROVISION INVOLVED

The relevant portions of 33 U.S.C. § 2211 are reproduced in the appendix to this petition. *See* Pet. App. at 32a.

STATEMENT OF THE CASE

The petitioners own or operate dozens of transmission pipelines that cross under the Houston Ship Channel ("Channel"). Owners' pipelines operate in both interstate and intrastate commerce transporting crude oil, natural gas, refined products, liquefied petroleum gases, industrial gases, and chemicals under the Channel. 2R.247. Each pipeline holds a permit from the Corps. 14R.3640-3811; 22R.5603-5606; 22R.5638-5641; 22R.5655-5656.

The Houston-Galveston Navigation Channel, Texas Project ("Project") necessitated relocation of pipelines so that the Channel can be deepened and widened. 1R.5781. By the Corps' count, the Project required relocation of 123 pipelines at an aggregate cost of at least $115 million. 8R.1966-1968, 2113. Owners' pipelines were included in this total. *Id.* The Corps sent "Notice to Remove" letters to Owners at the Port's urging, ordering Owners to relocate their pipelines at their own expense. 1R.5781.

This directive to relocate at Owners' expense runs directly counter to congressional intent as stated in WRDA-86. Relying on the Corps' ability to invoke the navigational servitude to compel relocation, the Fifth Circuit erroneously allowed the Corps to seize control of the cost allocation issue, improperly expanding the navigational servitude and directly contravening congressional intent. Pet. App. at 9a-14a.

A. Congress Enacted WRDA-86 To Allocate Costs For Navigation Projects Between The Federal Government And Local Sponsors

The Channel has been widened or deepened several times since its creation in the late nineteenth century. A feasibility study completed in 1987 advocated deepening the Channel to 50 feet. This proposal roughly coincided with the enactment of WRDA-86, now codified at 33 U.S.C. §§ 2201 et seq. WRDA-86 broke with a history of *ad hoc* commitment of federal dollars to navigation projects and established a uniform policy of cost-sharing with local sponsors on future navigation projects.

Under WRDA-86, projects for harbor and navigation channel construction require sponsorship and financial commitment not only from the federal government, but also from a local sponsor or "non-Federal interest."[2] The local sponsor is required to pay:

> (A) 10 percent of the cost of construction of the portion of the project that has a depth not in excess of 20 feet; plus
>
> (B) 25 percent of the cost of construction of the portion of the project that has a depth in excess of 20 feet but not in excess of 45 feet; plus

---

2. Under 33 U.S.C. §§ 2219 and 2241, a "non-Federal interest" is a "legally constituted public body with full authority and capability to perform the terms of its agreement and to pay damages, if necessary, in the event of failure to perform." The Port is the non-federal interest, or local sponsor, of the Project. 2R.232, 237.

> (C) 50 percent of the cost of construction of the portion of the project which has a depth in excess of 45 feet.

33 U.S.C. § 2211(a)(1).

In the case of utilities that must be moved to make way for a project (such as Owners' pipelines), the local sponsor must

> ***perform or assure the performance of all relocations of utilities necessary to carry out the project***, except that in the case of a project for a deep-draft harbor . . . one-half of the cost of each such relocation shall be borne by the owner of the facility being relocated and one-half of the cost of each such relocation shall be borne by the non-federal interests.

33 U.S.C. § 2211(a)(4) (emphasis added). The Port is the local sponsor of the Project. 2R.232, 237.

B. WRDA-86 Defers To State Law To Determine Payment Of Relocation Costs

For pipeline relocation costs, WRDA-86 adopts the rule that state law decides which party – local sponsor or facility owner – must shoulder utility relocation costs associated with the joint federal/state navigation project. H.R. CONF. REP. NO. 99-1013, at 205 (1986). Thus, except in the case of a deep-draft harbor, WRDA-86 leaves to state law the question of who must bear relocation costs. When a navigation district such as the Port requires relocation or removal of a pipeline, Texas law provides that the navigation district must

bear the costs at its "sole expense." TEX. WATER CODE ANN. § 60.102(a) (Vernon 1988).

C. The Corps Acknowledged That Under WRDA-86 The Port Had To Pay For Utility Relocations Required To Deepen And Widen The Channel

The Corps and Port acknowledged that the Project's local sponsor – the Port – would bear the costs of relocating utilities such as Owners' pipelines. In the 1987 feasibility study, the Corps concluded:

> In accordance with Public Law 99-662 [WRDA-86], ***non-federal interests [i.e., the Port] would be responsible for . . . [a]ll relocations and alterations of utilities, pipelines, cables, and sewer outlets necessary for the project***, except that in the case of a deep-draft harbor, one-half of the cost of utility relocations shall be borne by the owner of the facility being relocated and one-half of the cost of each such relocation shall be borne by the non-federal interests.

7R.1642 (emphasis added). For nine years thereafter, the Corps consistently acknowledged the local sponsor should bear these costs. *E.g.*, 12R.3221 (in August 1993, identifying "Structure and Pipeline Relocations" as non-federal sponsor costs).

D. At The Port's Behest, The Corps Reversed Its Longstanding Position On Who Must Pay For Utility Relocations

Because of difficulties in justifying the Project economically and environmentally, the Corps and Port opted in 1993 to undertake a shallower project with a 45-foot "design depth" over most of its length. The Port still complained about various elements of the Project's cost estimate, including the "cost of relocations" of Owners' pipelines "even though to our knowledge the existing pipelines have not changed." 12R.3234. The Corps acknowledged that "cost of [pipeline] relocations has increased," but observed that it was because the number of affected pipelines increased. 12R.3228. Later, the Port admonished the Corps, "We have a tremendous problem with pipelines that is unique to the Texas Gulf Coast. Failure of the Corps to use its authority would in all likelihood kill this project." 12R.3052.

Until this point, Corps policy had recognized, in conformity with WRDA-86, that it was "the basic responsibility of the local [i.e., non-federal] sponsor to assure that utilities are relocated at non-Federal expense." Policy Guidance Letter No. 8 ("PGL 8"). 12R.3279. Corps policy correctly held that this assignment of responsibility did not determine who, as between the local sponsor and the owner, ultimately "absorb[ed] the costs." *Id.* This approach was required by the statutory language and by the Conference Report's directive that the issue of who should bear relocation costs would be "resolved between the non-Federal interest and the owners of the facilities being relocated." H.R. CONF. REP. No. 99-1013, at 205.

In response to the Port's importuning, the Corps reversed its policy for the purpose of shifting costs from the Port to Owners notwithstanding WRDA-86. The Corps circulated its draft to the Port. 12R.3075-3088. The Port and Corps agreed that further development of the policy would be treated as "a *partnership* issue and decision, not to be decided unilaterally by the Corps." 12R.3069 (emphasis in original).

The new draft policy sought to shift to Owners the cost of utility relocations when the Port claimed it lacked the ability to force a relocation ***at the owners' cost***. The Port's general counsel warned that TEXAS WATER CODE § 60.102(a) required the Port, not Owners, to bear relocation costs. She concluded that the Port lacked the authority to require the pipelines to relocate *at owner cost*, and that any attempt to do so might result in an unacceptable delay in starting work on the Project. 2R.241. The Port's outside counsel and the Corps' counsel concurred. 2R.239-240; 9R.2350D-2350; 9R.2254-2275.

This effort to shift costs was reflected in the two-volume Limited Reevaluation Report and Supplemental Environmental Impact Statement ("LRR"), which the Corps' Galveston district engineer issued principally to address the Project's environmental concerns. Buried in the two volumes were suggestions that Owners' pipelines should be "removed" along with "other obstructions to the channel improvements." 8R.1981. Reflecting the Corps' policy reversal, the LRR asserted that "cost for removal and replacement of pipelines . . . are not included in the baseline cost estimate because ***these costs are owner costs, not project costs.***" 8R.2000A (emphasis added). According to the LRR, this conclusory assertion allegedly was based on the Corps' "current policy," or Policy Guidance Letter No. 44 ("PGL 44"), which

formalized the Corps' draft policy and was issued about two weeks before the date of the LRR. 9R.2215-2224.

In May 1996, the Corps presented Congress with a Chief's Report making recommendations regarding the Project. This Report did not propose any change to Congressional policy as set forth in WRDA-86. To the contrary, the Report noted that it was "[b]ased upon existing cost sharing policy" and further recommended implementation of the proposed project "generally" in line with the LRR, "subject to applicable cost-sharing and financing requirements." 8R.2112-2113. Because Congress had not amended the nation's water project policy in any material respect since adopting the cost-sharing formulas in WRDA-86, the Chief's invocation of "existing cost sharing policy" necessarily referred to WRDA-86. Closely paraphrasing WRDA-86, the Chief's Report also restated the requirement that "the non-federal sponsors shall . . . provide all lands . . . and perform or ensure the performance of all relocations determined by the federal Government to be necessary. . . ." 8R.2112.

E. Contrary To WRDA-86, The Corps Ordered Utility Pipeline Relocations "At Owner Expense"

In the Water Resources Development Act of 1996, Pub. L. No. 104-303, 110 Stat. 3658 ("WRDA-96"), Congress authorized approximately 100 new projects, including 31 "Projects With Chief's Reports." 17R.4497-4626. With respect to the latter group, which included the Project, Congress noted that they were "to be carried out . . . substantially in accordance with the plans, and subject to the conditions, described in the respective reports. . . ." WRDA-96 § 101(a) (17R.4623). The Project was authorized

as a cost-sharing project in which the Corps represented the federal interest and the Port constituted the local or non-federal interests. 2R.237.

Under WRDA-86 and other applicable federal statutes, the execution of a Project Cooperation Agreement, or "PCA," was a necessary pre-condition to the commencement of construction on all federally-subsidized water projects. *See* 33 U.S.C. § 2211(e); 42 U.S.C. § 1962d-5b(a). The Corps signed a PCA with the Port on June 10, 1998. 2R.237; 7R.1263-1307. Five days later, the Corps began sending notices requiring Owners to remove their pipelines to accommodate the Project, directing that "[a]ll removals and any subsequently permitted relocations . . . shall be accomplished at owner expense." Owners subsequently relocated their pipelines.

F. The Fifth Circuit Allowed The Corps To Impose The Full Expense Of Utility Relocations On Owners

On November 25, 1998, Owners sued the Corps in the United States District Court for the Southern District of Texas, Houston Division, seeking a declaration that the Notice to Remove letters, which ordered Owners to pay all relocation costs, were void as an unauthorized exercise of federal power. 2R.20-22.[3] A Consolidated Complaint was

3. Owners also sued the Port in Texas state court seeking a declaration that the Port had required the relocation of their pipelines within the meaning of TEXAS WATER CODE § 60.102(a), so that the Port was responsible for 100% of the relocation costs. Owners also alleged that the Port was taking their property without just compensation in violation of the United States and Texas Constitutions. 18R.30-33. In the alternative, Owners sought a declaration in the state-court suit that the Project is a deep-draft harbor project under WRDA-86, so that the Port must pay 50% of the (Cont'd)

filed on February 5, 1999. 2R.139-182. Additional Owners intervened. 19R.4834-4835; 22R.5550. The Port and Corps answered, and the Port counterclaimed for a declaration that Owners must bear all pipeline relocation costs. 2R.204-212; 2R.223-235.

On March 26, 1999, the parties filed stipulated facts. 2R.230-248. On April 30, 1999, Owners moved for summary judgment on all claims except the takings claim. 19R.4865-4871. The Port and Corps responded and filed cross-motions for summary judgment. 19R.4902-4906; 20R.4907-5265; 21R.5267-5311; 21R.5373-5377.

On January 25, 2002, the district court issued an order and final judgment with an accompanying opinion. 1R.5775-5781; Pet. App. at 18a-27a. The district court granted Owners' motion, in part; denied the Port's and the Corps' motions; and dismissed all other claims without prejudice. 1R.5775-5781. The district court held that WRDA-86 controlled the cost-allocation determination for the Project, and that under Texas law the Port was to bear the relocation costs. Pet. App. at 7a, 23a-24a. The district court denied Owners' request for summary judgment on the alternative claim that the Project is a deep-draft harbor. 1R.5775-5781.

The Fifth Circuit affirmed in part and reversed in part.[4]

(Cont'd)

relocation costs. 18R.31-32. The Port removed the second case to federal court, where proceedings were consolidated. 18R.52; 2R.84. The Port expressly waived any Eleventh Amendment immunity. 2R.237.

4. Insofar as the Fifth Circuit affirmed the district court's judgment, it held that the Project is not a deep-draft harbor for purposes of 33 U.S.C. § 2211(a)(4). Pet. App. at 17a. Petitioners do not challenge this portion of the Fifth Circuit's judgment.

On the issue of whether Owners or the Port must bear full relocation costs, the Fifth Circuit held that "the Corps properly exercised its navigational servitude over the pipelines and waterway covered by the [Owners'] . . . permits, requiring Owners to remove those pipelines at their expense." Pet. App. at 16a. Reasoning that the Corps rather than the Port had required the pipeline relocations at issue, the Fifth Circuit held that section 60.102(a) of the TEXAS WATER CODE requiring payment by the Port did not apply. Pet. App. at 9a ("This provision is not applicable because the Port did not *require* relocation – the Corps did") (original emphasis). Based on this conclusion, the Fifth Circuit held that "it is not necessary to resolve whether WRDA-86 or WRDA-96" controls" because "in any event, Tex. Water Code § 60.102 does *not* apply." *Id.* (original emphasis).

REASONS FOR GRANTING THE PETITION

This Court should grant Owners' petition for a writ of certiorari because the Fifth Circuit's judgment in this case erroneously expands the constitutional navigational servitude doctrine, allowing the Corps to seize control of non-federal cost issues and to substitute its policy for congressional mandates.

The navigational servitude arises from the Commerce Clause and accordingly is a power belonging to Congress. This power has been delegated to the Corps, although Congress retains the prerogative not to use it. By invoking the navigational servitude, the Corps can require removal of obstructions from navigable waters at no cost to the federal government.

As interpreted and expanded by the Fifth Circuit, the navigational servitude not only authorizes the Corps to remove obstructions without cost to the ***federal*** government, but also authorizes the Corps to (1) impose these costs on property owners; and (2) shield ***local*** governments and other non-federal parties from state law reimbursement rules. This ruling

- improperly expands the navigational servitude beyond its constitutional purpose and limits;

- interferes with congressionally mandated rules that place responsibility for removal costs on the local public sponsor, rather than on private property owners;

- contravenes principles of federalism by improperly overriding state law, including state-imposed constraints on one of its political subdivisions;

- effectively prevents private property owners from factoring in the risk of or otherwise managing possible removal costs, thereby deterring private capital investment in and near the nation's ports; and

- defers unjustifiably to a Corps policy in derogation of an unambiguous statute.

Whether the federal government can invoke the servitude to ensure that it will not bear removal costs is not at issue. The issue is whether the servitude empowers the Corps to be

the judge of how ***non-federal*** costs are allocated among ***non-federal*** entities, in contravention of both federal and state statutes.

Given the nature of water projects, these non-federal costs are substantial; in this case alone, the Project required relocations of 123 pipelines at an aggregate cost exceeding $115 million. 8R.1966-1969, 2113. The magnitude of this expense confirms that this Court's intervention is warranted without regard to whether a circuit split exists. The conclusion is underscored by the sheer number of port and harbor projects nationwide where pipeline and utility relocation issues are likely to arise.

The plain language of WRDA-86 unequivocally establishes Congress' determination that the local sponsor for a navigation project – not the Corps – is responsible for the relocation of any utilities, including pipelines. If the local sponsor has the ability to shift those costs to the owner under local law it may do so, but Congress refrained from deciding that question and did not authorize the Corps to decide it.

When Congress unambiguously states its intent, as it has in WRDA-86, an executive agency such as the Corps has no right to second-guess Congress' choice. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (when Congress' intent "is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress").

By like token, no deference is warranted towards an agency determination that contravenes unambiguous statutory language. *General Dynamics Land Sys., Inc. v. Cline*, 124

S. Ct. 1236, 1248 (Feb. 24, 2004). "Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *Id.* When the agency's position is "clearly wrong" because it contravenes express statutory language, that position must be rejected. *See id.*

The Fifth Circuit further erred by deferring to an untenable interpretation adopted in anticipation of this litigation under circumstances when deference is not warranted. In this regard, the panel opinion is inconsistent with *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159 (2001).

Without regard to the existence or absence of a circuit split, this Court in *Solid Waste Agency* recognized that intervention was warranted to address an overreaching Corps interpretation of a statute – especially when that interpretation is inconsistent with an earlier Corps interpretation of the same statute. *See id.* at 166-68.

The same circumstances exist here and point toward granting certiorari.

I. The Fifth Circuit Improperly Allowed The Corps To Decide Cost Issues Between Non-Federal Parties In Contravention Of Congressional Intent And WRDA-86

A. Congress Chose State Law To Allocate Non-Federal Expenses Among Non-Federal Entities

WRDA-86 allocates responsibilities between the federal government and the local public sponsor – in this case, the Port. When utilities such as Owners' pipelines must be moved to make way for a project (other than a deep-draft harbor), the ***local public sponsor*** must "***perform or assure the performance of all relocations*** of utilities necessary to carry out the project. . . ." 33 U.S.C. § 2211(a)(4) (emphasis added).

For pipeline relocation costs, Congress chose state law to decide which party – the local public sponsor or facility owner – must shoulder relocation costs associated with a joint federal/state navigation project. As stated in the Conference Report that accompanied the final version of WRDA-86:

> For projects involving depths of forty-five feet or less, the legislation does not restrict in any way the manner in which the non-Federal interest [*i.e.*, local public sponsor] finances the relocation. If the non-Federal interest has the authority to compel the owner of the facility to pay relocation costs, it may do so. By the same token, the non-Federal sponsor may pay as much of the relocation costs as may be required or appropriate.

> ***This question is to be resolved between the non-Federal interest and the owners of the facilities being relocated.***

H.R. CONF. REP. No. 99-1013, at 205 (1986) (emphasis added). Whether the local public sponsor, an organ or instrumentality of the state, must pay (or has authority to compel owners to pay) relocation costs is governed by state law. Thus, except in the case of a deep-draft harbor, WRDA-86 defers to state law.[5]

Responsibility for pipeline relocations is spelled out in 33 U.S.C. § 2211(a)(4), entitled "Utility Relocations." *See* Pet. App. at 33a. It provides that the "non-federal interests . . . shall perform or assure the performance of all relocations of utilities necessary to carry out the project. . . ." The Port is the non-federal interest, or local sponsor, for the Project. Hence, as between the Port and the Corps, it is the Port that Congress has directed to "perform or assure the performance" of all utility relocations occasioned by the Project.[6]

Under WRDA-86, therefore, and with respect to navigation projects other than deep-draft harbors, the local

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5. Under Texas law, when a navigation district such as the Port requires relocation or removal of a pipeline, the navigation district must bear the costs at its "sole expense." TEX. WATER CODE ANN. § 60.102(a) (Vernon 1988). Relocation is "required" for these purposes if necessitated by a district-approved project. OP. TEX. ATT'Y GEN. No. MW-412 (1981).

6. The Corps acknowledged this determination in its first policy statements issued after the enactment of WRDA-86. *See* Corps Policy Guidance Letter No. 8 (May 19, 1988) § 3 (12R.3278-3279); Corps Policy Guidance Letter No. 9 (June 13, 1988) § 3. 12R.3274-3276.

sponsor – not the United States – is responsible for utility relocations. The Senate and House conferees stated this language "does not restrict in any way the manner in which the non-federal interest ***finances*** the relocation" of any "pipelines, cables, and related facilities. . . ." H.R. CONF. REP. No. 99-1013, at 205 (15R.3841) (emphasis added). Thus, Congress placed the burden of relocation on the local sponsor but refrained from deciding who, as between the local sponsor and the owner, would bear the relocation costs. It said, "This question is to be resolved between the non-federal interest and the owners of the facilities being relocated." *Id.*

B. The Fifth Circuit's Analysis Thwarts Congressional Intent And Contravenes Principles Of Federalism

1. The Fifth Circuit endorsed use of the navigational servitude to trump congressional intent

The Fifth Circuit's opinion allows congressional intent to be thwarted by (1) allowing the Corps to invoke the navigational servitude at the Port's request, thereby reversing the assignment of responsibilities for relocation costs made by Congress in WRDA-86; and (2) concluding that this action prevents Owners from recovering that expense under state law. The panel erroneously concluded that this maneuver relieved the Port of its state law responsibility because the Corps, rather than the Port, "required" the pipeline relocations. *See* Pet. App. at 9a.

The navigational servitude is a power held by Congress under the Commerce Clause. It allows Congress to require

removal of navigational obstructions ***at no cost to the United States***. *Gibson v. United States*, 166 U.S. 269, 271-72 (1897). Congress delegated this power to the Corps under the River & Harbors Act of 1899, although Congress retains the prerogative "not to assert the navigational servitude. . . ." *Lambert Gravel Co. v. J.A. Jones Constr. Co.*, 835 F.2d 1105, 1110 (5th Cir. 1988). When the servitude is exercised, the owner frequently must bear the cost. But the servitude does not prohibit a party other than the owner – such as an insurer, indemnitor, or state governmental subdivision – from paying the cost.

A central premise of the panel opinion is this: The Port did not "require" relocation of the pipelines at issue because the Corps did so. *See* Pet. App. at 9a. And because the Corps rather than the Port "required" the relocation, state law mandating that the Port must pay for Port-required relocations does not come into play. *See id.* There is a fundamental flaw in this reasoning. While the navigational servitude insulates the federal government from expense, it does not give the Corps authority to rule on cost issues among ***non-federal entities*** or to change a congressionally mandated allocation of ***non-federal expenses***.[7]

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7. The Fifth Circuit's opinion includes a discussion of the court's view on whether the Port had authority under state law to require relocation. Pet. App. at 9a-10a, 13a-14. Because the Fifth Circuit concluded that "Texas law does not apply to the relocation," Pet. App. at 14a, the discussion of the Port's authority under state law is *dicta*. The Fifth Circuit predicated its judgment on a holding that the Corps required relocation rather than the Port. *Id.* at 9a. For the reasons discussed in this petition, the Fifth Circuit's judgment in that regard is erroneous and should be reversed and remanded; upon remand, the Fifth Circuit can address the merits of the state-law issues.

It is no answer to assert that the Owners' rights are subject to § 10 permits requiring Owners to remove obstructions at no cost to the federal government. *Id.* at 14a. The permits are no broader than the navigational servitude itself. *See id.* Because the costs and responsibilities at issue here are entirely non-federal, neither the servitude nor permits tracking the servitude are implicated. Nor is it an answer to assert that WRDA-86 contains no express waiver of the navigational servitude. *See id.* at 16a. Even assuming the absence of an express waiver – which Owners do not concede in light of WRDA-86's unambiguous terms – the analysis does not change because the costs at issue are non-federal and outside any proper application of the navigational servitude. Thus, no waiver is required.[8]

In WRDA-86, Congress assigned responsibility for utility relocations to the local sponsor, not the federal sponsor.

8. The Fifth Circuit attempts to bolster its approval of the Corps' end-run by relying on and extending *United Texas Transmission Co. v. United States Army Corps of Engineers*, 7 F.3d 436 (5th Cir. 1993) ("*UTTCO*"). *See* Pet. App. at 14a-15a. *UTTCO* does not support the use of the navigational servitude in this case because *UTTCO* did not deal with the WRDA-86 requirement that the local public sponsor must "perform or assure performance of" relocations. No issue was presented in *UTTCO* concerning whether the owner necessarily must pay when the servitude is exercised. The pipelines had been relocated, and it was "***not disputed*** . . . that permit-holders must pay for the movement of any portion of the pipeline that is located within the original permit area." *Id.* at 441 (emphasis added). The primary focus of *UTTCO*'s discussion of the navigational servitude was on the Corps' right to revoke the permit of an owner who refused repeated requests to relocate. *Id.* at 439, 445-47. The court concluded that UTTCO should have done precisely what Owners did in this case – relocate, and then seek legal remedies for any appropriate reimbursement. *Id.* at 446-47. In light of these important differences, the Fifth Circuit's reliance on *UTTCO* is unwarranted.

By making this determination, Congress necessarily decided that the navigational servitude, a federal power, would not be asserted to effectuate utility relocations on cost-sharing navigation projects. "Congress may decide, in a particular case, not to assert the navigational servitude." *Lambert Gravel,* 835 F.2d at 1110.

Such is the case with WRDA-86. The plain language of WRDA-86 is susceptible to no other reading, because Congress must be presumed to have been aware of its rights under the navigational servitude. *See, e.g., Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (the Supreme Court will "presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts"); *St. Louis, I.M. & S. Ry. v. United States*, 251 U.S. 198, 207 (1920); *FDIC v. Faulkner*, 991 F.2d 262, 265 (5th Cir. 1993). Had it been Congress' intent for the federal sponsor to effect the removal of pipelines and other utilities, it would not have assigned the job to the local sponsor.

2. The Fifth Circuit opinion renders WRDA-86's cost-sharing formulas meaningless

In WRDA-86, Congress specified the means by which it would bring financial accountability to federal water projects by placing on the local sponsor a portion of the costs and responsibilities that such projects entailed. *See, e.g.*, S. REP. No. 104-170, at 1 *et seq*. (15R.3984). Congress let WRDA-86 stand unamended in all material respects when it enacted WRDA-96.[9]

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9. The Port and the Corps argued on appeal that WRDA-96 controls cost allocation for the Project and places responsibility for costs on Owners. Pet. App. at 9a. Owners contend that WRDA-86 (Cont'd)

Under the Fifth Circuit's decision in this case, the Corps and the Port nonetheless are free to ignore Congress' express instructions and to evade the cost-sharing requirements of WRDA-86 through *ad hoc* applications of federal authority. There is little reason for local sponsors to shoulder their WRDA-86 responsibilities hereafter. They can simply claim (as the Port claimed here) that they lack authority to cause relocations of pipelines ***at no cost to themselves***, and then ask the Corps to impose relocation costs on owners.

As a result, the cost-sharing formulas of WRDA-86 now are largely meaningless. It should not be so easy to trample congressional policy. *See, e.g., Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 472 (1997) (rejecting agency's proffered interpretation of statutory term on grounds, among others, that acceptance of agency interpretation would leave statute "without any significant effect at all"); *Federal Labor Relations Auth. v. Aberdeen Proving Ground*, 485 U.S. 409, 414 (1988) (reviewing courts "must not 'rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that

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(Cont'd)

controls. The Fifth Circuit did not reach this issue in light of its holding that the Corps' invocation of the navigational servitude negated the state-law cost-allocation mechanism selected in WRDA-86. *Id.*; *see also id.* at 12a ("Because neither WRDA-86 nor WRDA-96 includes a clear Congressional waiver of the navigational servitude, we need not reach which Act controls for cost-sharing"). Because the Fifth Circuit's judgment is erroneous insofar as it allows the navigational servitude to trump the state law mechanism selected by WRDA-86, the Fifth Circuit's judgment should be reversed and this matter should be remanded to the Fifth Circuit for further consideration of the interaction between WRDA-96 and WRDA-86.

frustrate the Congressional policy underlying a statute'") (citing *Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Auth.*, 464 U.S. 89, 97 (1983)).

3. The Fifth Circuit's ruling also contravenes federalism principles

By enacting section 60.102 of the TEXAS WATER CODE, the State of Texas has limited the authority of its component navigation districts; the districts may not undertake projects that require relocations of pipelines unless they pay relocation costs. This is a reasonable choice, but more to the point, it is the State's choice to make.

An interpretation of the federal statutes at issue or of the servitude that conflicts with this policy choice by the State of Texas should be avoided under the Tenth Amendment and principles of federalism. *E.g.*, *Penn Dairies, Inc. v. Milk Control Comm'n*, 318 U.S. 261 (1943) (rejecting contention that the Secretary of War could displace state law governing price of milk sold for Army consumption absent clear congressional intent to displace state law). As the Court emphasized in *Penn Dairies*, "We have recognized that the Constitution presupposes the continued existence of the states functioning in coordination with the national government, with authority in the states to . . . regulate their internal affairs and policy. . . ." *Id.* at 270-71. "An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred. . . ." *Id.* at 275; *see also Texas v. United States*, 730 F.2d 339, 355 (5th Cir. 1984) ("The source of judicially enforceable rights of state sovereignty is not so much the text of the Tenth Amendment as it is the structural assumption of the Constitution as a

whole that the states will remain separate and meaningful decision-making, functioning governmental entities").

To avoid conflict, WRDA-86 and Corps authority should not be construed to override a state-imposed constraint on the powers of its political subdivisions.

II. The Fifth Circuit Erred In Deferring To An Agency Application Of WRDA-86 That Subverts Clear Congressional Intent To Make The Port Responsible For Utility Relocations

The panel opinion compounds the errors described above by deferring to the Corps' assertion of authority under circumstances when no deference is warranted. *See* Pet. App. at 15a-16a.

A. The Corps' Application Of WRDA-86 Contravenes Congressional Intent

No deference is warranted here because the Corps invoked the navigational servitude to impose relocation costs on Owners despite Congress' clear and unambiguous directive in WRDA-86 that the non-federal sponsor must perform or assure performance of utility relocations. The panel thus errs by deferring to a new Corps policy – first adopted in 1995 in anticipation of this dispute – that subverts WRDA-86's clear language and its cost-sharing philosophy.

Since at least April 1986, Corps policy provided that the non-federal sponsor was responsible for utility relocations, notwithstanding the navigational servitude. 21R.5319-20. When it enacted WRDA-86, Congress "continue[d] the

current policy" that the non-federal sponsor was responsible for pipeline and other utility relocations. 15R.3841. For nine years thereafter, the Corps consistently interpreted WRDA-86 to place the responsibility for relocation on the non-federal sponsor. *See, e.g.*, 12R.3279, 3274-75. The project's feasibility study expressly incorporated this policy. 7R.1542 at ¶ 35. Only in the last days of study for the Project did the Corps reverse its position in response to the Port's urging that adhering to the original policy would "kill this project" and that "our partnership has made too much progress to allow this to happen." 12R.3052.

The issue, therefore, never has been whether the Port had the authority to compel relocation – it does. The only issue has been whether the Port had the authority to compel relocation ***at owners' expense***. Continuing to act as partners in a joint enterprise (*e.g.*, 9R.2277), the Corps and the Port agreed to try to shift the costs of the pipeline relocations from the Port to Owners. The rationale for their decision appears in the Corps' Policy Guidance Letter No. 44 (9R.2215-24) ("PGL-44"), cited and discussed in the panel opinion. *See* Pet. App. at 15a.

Because PGL-44 effectively eliminates any possibility that a local public sponsor would pay for a utility relocation, the Corps' action frustrates Congress' clear intent in WRDA-86 that cost allocation was "to be resolved between the non-federal interest and the owners of the facilities being relocated." H.R. CONF. REP. No. 99-1013, at 205 (1986). As a "policy statement," PGL-44 lacks "the force of law" and "does not warrant *Chevron*-style deference." *Christensen v. Harris County,* 529 U.S. 576, 587 (2000). Where the "intent of Congress is clear," as it is in WRDA-86, no deference of any kind is due an agency's divergent interpretation. *Chevron*

U.S.A., Inc., 467 U.S. at 842-43; *General Dynamics Land Sys., Inc.*, 124 S.Ct. at 1248.

B. The Corps' New Interpretation Of WRDA-86 Should Be Rejected In The Absence Of A Clear Indication Of Congress' Desire To Expand The Navigational Servitude

The panel's deference to the Corps is misplaced for the further reason that without "overwhelming evidence of acquiescence" by Congress, courts should be "loath to replace the plain text and original understanding of a statute" with an amended and inconsistent agency interpretation. *Solid Waste Agency,* 531 U.S. at 168-70 & n.5.

The circumstances in *Solid Waste Agency* parallel those present here. This Court rejected a Corps rule extending the definition of "navigable waters" under the Clean Water Act, 33 U.S.C. § 1344(a), to include intrastate waters used as a habitat by migratory birds which cross state lines – including the abandoned sand and gravel pit at issue in the case – because this extension exceeded the Corps' authority under the statute. *Id.* at 167.

In reaching this conclusion, the Court noted that the Corps' later expanded rule and interpretation were inconsistent with the Corps' original 1974 interpretation of the Clean Water Act. Under that earlier interpretation, "'the water body's capability of use by the public for purposes of transportation or commerce'" was "'the determinative factor'" in deciding whether a body of water constituted "navigable waters." *Id.* at 168 (quoting 33 C.F.R. § 209.260(e)(1)).

The Court also underscored its concern regarding unwarranted deference to an agency's statutory interpretation that "invokes the outer limits of Congress' power," cautioning that "we expect a clear indication that Congress intended that result." *Id.* at 172. "This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 172-73.

Similar concerns arise from the Corps' conduct in the present case. Previous Corps policy had recognized that it was "the basic responsibility of the local [i.e., non-federal] sponsor to assure that utilities are relocated at non-Federal expense." 2R.3279. The Corps then reversed its policy for the purpose of shifting costs from the Port to Owners notwithstanding WRDA-86. 8R.2000A; 9R.2215-2224. This policy shift expands the navigational servitude far beyond authorizing the Corps to remove obstructions without cost to the federal government. The Corps now has claimed authority to reallocate the division of non-federal costs among non-federal entities. As in *Solid Waste Agency*, this Court should reject any "administrative deference" predicated on an interpretation that raises significant questions regarding federalism and the permissible scope of statutory authority. *See* 531 U.S. at 684.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted. The judgment of the court of appeals should be reversed, and this matter should be remanded to the court of appeals for further consideration.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
FILED JANUARY 30, 2004

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 02-20442

AIR LIQUIDE AMERICA CORPORATION; EGP FUELS COMPANY; EQUILON PIPELINE COMPANY, LLC; EXXON PIPELINE COMPANY; FLORIDA GAS TRANSMISSION COMPANY; HOUSTON PIPE LINE CO.; HSC PIPELINE PARTNERSHIP LP; MOBIL CHEMICAL COMPANY, an unincorporated division of Mobil Oil Corporation; MOBIL PIPELINE COMPANY; SEADRIFT PIPELINE CORPORATION; TE PRODUCTS PIPELINE COMPANY LIMITED PARTNERSHIP; TEXAS EASTERN TRANSMISSION CORP.; UCAR PIPELINE INCORPORATED; CHEVRON CHEMICAL CO.; CHEVRON PIPELINE CO.; DYNEGY MIDSTREAM SERVICES; TEPPCO CRUDE OIL LLC,

Plaintiffs-Counter Defendants-
Appellees-Cross-Appellants,

DUKE ENERGY TRANSPORT AND
TRADING COMPANY,

Plaintiff-Counter Defendant-Appellee,

Appendix A

AIR PRODUCTS INCORPORATED; AIR PRODUCTS MANUFACTURING CORPORATION; BLACK MARLIN PIPELINE COMPANY; TEJAS SHIP CHANNEL LLC; TEJAS SOUTH PIPELINE PARTNERSHIP,

Intervenor Plaintiffs-Appellees-Cross-Appellants,

versus

U.S. ARMY CORPS OF ENGINEERS,

Defendant-Counter Claimant-Appellant-Cross-Appellee,

PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY, TEXAS,

Movant-Appellant-Cross-Appellee.

AIR LIQUIDE AMERICA CORPORATION; EGP FUELS COMPANY; EQUILON PIPELINE COMPANY LLC; EXXON PIPELINE CO.; FLORIDA GAS TRANSMISSION COMPANY; HOUSTON PIPE LINE CO.; HSC PIPELINE PARTNERSHIP LP; MOBIL CHEMICAL COMPANY, an unincorporated division of Mobil Oil Corporation; MOBIL PIPELINE COMPANY; SEADRIFT PIPELINE CORPORATION; TE PRODUCTS PIPELINE COMPANY LIMITED PARTNERSHIP; TEXAS EASTERN TRANSMISSION CORP.; UCAR PIPELINE INC.,

Plaintiffs-Appellees-Cross-Appellants,

Appendix A

DUKE ENERGY TRANSPORT AND
TRADING COMPANY,

Plaintiff-Appellee,

versus

PORT OF HOUSTON AUTHORITY OF
HARRIS COUNTY, TEXAS,

Defendant-Appellant-Cross-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

Before BARKSDALE, DeMOSS and BENAVIDES, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

At issue is cost-allocation for privately owned pipelines under the Houston Ship Channel (channel) being relocated as part of the project by the United States Army Corps of Engineers and the Port of Houston Authority to widen and deepen the channel. The Corps and the Port appeal the partial summary judgment awarded the pipeline owners: *inter alia,* the Port was held responsible for the relocation cost. Owners' conditional cross-appeal is from the district court's denial of their alternative summary judgment claim: that the project was for a deep-draft harbor; and that, accordingly, the Port would have to bear half of the relocation cost.

Appendix A

The principal sub-issues are: whether, as held by the district court, the Port must bear the cost, pursuant to TEX. WATER CODE § 60.102 (relocation cost to be borne by district if it "required" the relocation); and, if not, whether, in requiring Owners to relocate the pipelines at their expense, the Corps was properly enforcing both the federal navigational servitude and the Corps' associated federal permit authority.

Texas law does *not* control. Consistent with, *inter alia,* the Corps' well- settled authority to enforce its permits, Owners were required to relocate their pipelines at their expense. Concerning Owners' conditional cross-appeal, the project was *not* for a deep-draft harbor; therefore, the Port was *not* required to bear half of the relocation cost. **VACATED in PART; AFFIRMED in PART; and RENDERED.**

I.

The Rivers and Harbors Act of 1899, 33 U.S.C. § 401 *et seq.,* prohibits construction in navigable waters of the United States unless the work has been approved by the Secretary of the Army. Pursuant to this Act, and for more than 100 years, the Corps has regulated such construction, in part by issuing permits under § 10 of that Act. 33 U.S.C. § 403. These § 10 permits provide, *inter alia,* that pipelines and other structures beneath navigable waters are to be relocated at no expense to the United States if required by federal navigation interests or projects. In the 1940s and 50s, the Corps issued § 10 permits to Owners to install pipelines

beneath the channel. Each permit mandates pipeline-relocation as required by navigation needs and at no cost to the government.

Similarly, when the Texas legislature granted ownership of the land under the channel to the Port in 1927, the Port was given authority to franchise or lease the land for limited periods and purposes. *See* Act of March 11, 1927, 40th Leg., R.S., ch. 292, 1927 Tex. Gen. Laws 437. Accordingly, in addition to a federal § 10 permit, each Owner holds a license from the Port. One license condition is that Owners must relocate their pipelines at their cost if necessary for the channel.

In 1967, the House Committee on Public Works authorized a study for improving deep-draft channels, including the channel. The reconnaissance report for this study was completed in 1980.

The next step was the Water Resources Development Act of 1986 (WRDA-86), Pub.L. No. 99-662, 100 Stat. 4082 (1986); 33 U.S.C. § 2201 *et seq.* It contained the following cost-allocation provision:

> The non-Federal interests [here, the Port] for a [harbor navigation project] *shall perform or assure the performance of all relocations of utilities* necessary to carry out the project, *except that in the case of a project for a deep draft harbor* [deeper than 45 feet] *one-half of the cost* of each such relocation shall be borne by the owner of

> the facility being relocated and one-half of the cost . . . shall be borne by the non-Federal interests.

33 U.S.C. § 2211(a)(4) (emphasis added).

The feasibility study for the project was completed in 1987. In May 1995, the Corps published a draft report for public review that recommended proceeding with the channel's expansion. The draft report stated that Owners would bear the cost for relocation of approximately 130 pipelines. No Owner responded to the Corps about this notice.

The final version of the notice—the Limited Reevaluation Report (LRR)—was published in November 1995. The LRR estimated the pipeline relocation cost would exceed $100 million; and, as did the draft report, the LRR stated that Owners would bear that cost. Again, the Corps received no response from Owners. At the end of the comment period, the LRR was incorporated in the Chief of Engineers' Report (Chief's Report), which was transmitted to Congress by the Secretary of the Army.

The project was authorized by the Water Resources Development Act of 1996 (WRDA-96), Pub.L. No. 104-303, 110 Stat. 3658 (1996); 33 U.S.C. § 2330 *et seq.* That Act provided: "[t]he removal of pipelines and other obstructions that are necessary for the project shall be accomplished at non-Federal expense," ***id.*** § 101(a)(30), 110 Stat. at 3666; and the project would be "substantially in accordance with the plans, and subject to the conditions, described in" the Chief's Report, ***id.*** § 101(a), 110 Stat. at 3662. Again, one condition in that report was for the relocation cost to be borne by Owners.

Appendix A

As required for commencing the project, the Port entered into a Project Cooperation Agreement (PCA) with the Corps in June 1998. 42 U.S.C. § 1962d- 5b(a); *see* Pub.L. No. 99-662, 100 Stat. 4082, 4083 (1986). Shortly thereafter, as requested by the Port, the Corps, by removal-notices to Owners, enforced the § 10 permit conditions and instructed Owners to relocate their pipelines at their expense because of the project's requirements. Owners complied.

In November 1998, however, Owners filed this action, seeking a declaration that the Corps' removal-notices were void. Simultaneously, Owners filed an action in state court, claiming: pursuant to TEX. WATER CODE § 60.102, the Port had "required" the relocation and was therefore responsible for the cost; and the Port's not paying it was an unconstitutional taking. In the alternative, Owners' state action claimed the project was for a deep-draft harbor pursuant to WRDA-86, subject to its mandated cost-sharing among the Port and Owners.

The state action was removed by the Port and consolidated with this action. The Port counterclaimed, seeking a declaration that either WRDA-96 or the § 10 permits required Owners to pay the relocation cost.

In early 2002, on cross-motions for summary judgment, the district court granted partial judgment to Owners, holding: WRDA-96 did not amend the cost-sharing provisions of WRDA-86; pursuant to WRDA-86, state law was to answer the cost-allocation question; under Texas law, that cost was to be borne by the Port; and the licenses issued by the Port (placing cost with Owners) were preempted by Texas law.

Appendix A

The district court amended the Corps' removal-notices to Owners to reflect this ruling. On the other hand, the district court rejected Owners' alternative claim that the project was for a deep-draft harbor.

II.

A summary judgment is reviewed *de novo*. ***E.g., Texas Soil Recycling, Inc. v. Intercargo Ins. Co.***, 273 F.3d 644, 648-49 (5th Cir.2002). The Corps and Port contest the Port's being liable for the relocation cost and the amendment of the Corps' removal-notices. If those rulings are vacated, Owners contest the not-deep-draft-harbor-project ruling.

A.

1.

As the district court concluded, the language in neither WRDA-86 nor WRDA-96 explicitly allocates the relocation cost. The district court ruled that Texas law required the Port to bear it.

Taking a similar approach, Owners contend that WRDA-86, not WRDA-96, establishes the Port's cost liability. Support is found in the WRDA-86 conference report: "This [cost allocation] question is to be resolved between the non-Federal interest [Port] and the Owners of the facilities being relocated." H.R. CONF. REP. No. 99-1013, at 205 (1986). Along this line, Owners claim the Port must bear the cost pursuant to TEX. WATER CODE § 60.102, which provides: "If a district in the exercise of powers conferred by this

subchapter [port improvement] . . . requires the relocating . . . of any . . . pipeline, the relocating . . . shall be done at the sole expense of the district."

The Corps and Port maintain: WRDA-96, not WRDA-86, controls cost-allocation; and WRDA-96 places it on Owners. As discussed in part, *infra,* it is not necessary to resolve whether WRDA-86 or WRDA-96 controls. In any event, TEX. WATER CODE § 60.102 does *not* apply. First, to trigger that section's application, the Port had to "require" the relocation. It did not (and cannot) do so. Second, as discussed *infra,* the federal navigational servitude (applied through the § 10 permits) cannot be "trumped" in the absence of a clear Congressional waiver.

As quoted in part earlier, TEX. WATER CODE § 60.102 provides: "If a district in the exercise of the powers conferred by this subchapter or in the exercise of the power of eminent domain or the police power *requires* the relocating . . . of any . . . pipeline, the relocating . . . shall be done at the sole expense of the district." (Emphasis added.) This provision is not applicable because the Port did not *require* the relocation—the Corps did.

In this regard, the district court held, and Owners contend:

> The Corps issued the removal notices at the Port's request, acting as the Port's agent in requiring the owners to relocate the pipelines. The Port cannot escape its obligation to pay by shunting its order through an agent.

Appendix A

Air Liquide America Corp. et al. v. United States Army Corps of Eng'rs, et al., No. H-98-3982 at 5 (S.D. Tex. filed 25 Jan. 2002).

Under Texas law, for an agency relationship, the agent must be under the control of the principal; "even though one acts for and in behalf of another, if he is not under that other person's control, the relation of agency does not exist." ***Daily Int'l Sales Corp. v. Eastman Whipstock, Inc.***, 662 S.W.2d 60, 64 (Tex. App. 2001). In this instance, agency would require the Port's being "in control" of the Corps; for quite obvious reasons, the Port is not. By requiring removal of an obstacle to a navigable waterway, the Corps was acting pursuant to power delegated to it by Congress. It was pursuant to this power, not the Port's request, that the Corps required the relocation.

Owners contend the Port required removal through the Corps by: undertaking, initiating, and financing the project; signing a PCA with the Corps; and requesting the removal-notices from the Corps. First, the Corps, not the Port, sought Congressional approval for the project. Second, Congress authorized the project and provided the funds for construction of the navigation features, subject to partial reimbursement by the Port. Third, the Port's entering into the required PCA with the Corps in no way establishes that the Port required the relocation. To the contrary, the Port determined that it could not require pipeline relocation at Owners' expense. Therefore, the Port requested the Corps to exercise its § 10 permit authority under the federal navigational servitude.

Owners contend that, but for the Port's partial reimbursement, role in the PCA, and request that the Corps enforce the § 10 permits, there would have been no project. This misunderstands the meaning of "require" in § 60.102. These were necessary components of the project but certainly not sufficient on their own to cause the project to be undertaken. Restated, in order for the Corps and the Port to proceed, an agreement was required — the PCA. The PCA provided that the Corps would accomplish relocation, which it agreed to do through its § 10 permits. The PCA did not require the Corps to exercise its permit authority; and it certainly did not empower the Port to mandate the Corps to require pipeline relocation.

In support of their construction of state law, Owners point to TEX. WATER CODE § 50.052 (now repealed). It provided: if the district *required* relocation or alteration in its construction of any properties, it "shall be done at the sole expense of the district or authority". The Harris County Flood Control District (an entity analogous to the Port) sought an opinion on whether, under § 50.052, it would be required to bear the cost for lengthening a bridge. Texas' Attorney General opined: "[I]f the district widens the channel so as to render the bridge unusable, the district may reasonably be said to have acted to require the 'relocation . . . rerouting . . . or alteration in construction of . . . properties.'" OP. TEX. ATT'Y GEN. No. MW-412 (1981) (citing TEX. WATER CODE § 50.052).

Owners contend that § 60.102 applies to the Port in the same way. This contention neglects a crucial distinction: the Corps, not the Port, required Owners to relocate their pipelines. Similarly, the Port's request for removal-notices

by the Corps did not obligate it to issue them. ***See, e.g., California v. Sierra Club***, 451 U.S. 287 (1981).

2.

The Corps has the authority, under the federal navigational servitude, to require Owners to pay the relocation costs according to the original permits, as necessitated by the project. ***See United Texas Transmission Co. (UTTCO) v. United States Army Corps of Eng'eers*, 7 F.3d 436 (5th Cir.1993), *cert. denied***, 512 U.S. 1235 (1994). Because neither WRDA-86 nor WRDA-96 includes a clear Congressional waiver of the navigational servitude, we need not reach which Act controls for cost-sharing.

Congress derives the power to control navigation from its power to regulate commerce. ***Gibbons v. Ogden***, 22 U.S. (9 Wheat.) 1, 230-31 (1824). This power has been recognized to impose a "navigational servitude", described as follows:

> *All navigable waters are* under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various states and individual owners under them, it is *always subject to the servitude in respect of navigation* created in favor of the Federal government by the Constitution.

Gibson v. United States, 166 U.S. 269, 271-72 (1897) (emphasis added). This servitude operates to the exclusion of any competing or conflicting right. ***See United States v. Virginia Elec. & Power Co.***, 365 U.S. 624, 627-28 (1961).

The navigational servitude includes the right to authorize improvements to harbors and bays, as well as the power to determine what will be deemed an obstruction to navigation. ***See Pennsylvania v. Wheeling and Belmont Bridge Co.***, 59 U.S. (18 How.) 421, 431, 15 L.Ed. 435 (1855). Pursuant to § 10 of the Rivers and Harbors Act of 1899, Congress delegated this power to regulate such obstructions to the Secretary of War (now Secretary of the Army). It bears repeating that each Owner (or predecessor in interest) obtained a § 10 permit prior to construction of its pipeline.

a.

Addressing Owners' "contractual agreement[s]", the district court held: "The licenses [issued by the Port, requiring Owners' to bear relocation cost,] are preempted by the Texas Water Code." ***Air Liquide***, No. H-98-3982 at 5. As discussed *supra*, when title to submerged lands was granted to the Port in 1927, the Texas Legislature gave the Port "the right, power and authority to abate and remove any and all encroachments or structures of any kind now or hereafter existing on said property, *save such as may have been constructed under permit from the United States War Department [later the Corps]*. . . ." Act of March 11, 1927, 40th Leg., R.S., ch. 292, 1927 Tex. Gen. Laws 437, 439 (emphasis added). The licenses issued by the Port provide that, should pipeline relocation be necessary to accommodate deepening and widening the channel, the Owner will, "at its cost and expense and without cost or expense to the Port . . . remove, relocate, lengthen, deepen or otherwise conform" its pipeline to the project.

The district court ruled that Texas law preempted the licenses, in part because "[t]he Port, as a creature of the state, is bound by the regulations the state places on it." ***Air Liquide***, No. H-98-3982 at 5. But, as discussed *supra,* Texas law does not apply to the relocation. Again, the Corps, not the Port, "required" it. The reason the relocation was necessary— the project—was contemplated by the licenses. Through them, Owners agreed that, in the event "any installation [of pipelines] made under authority of this license shall interfere with the widening, deepening or other revision or improvement of the Houston Ship Channel," Owners would bear the relocation cost.

b.

Even if the Port-issued licenses do not control on cost-allocation, Owners would nevertheless be bound by their agreement with the Corps in the § 10 permits. As discussed, because the channel is a navigable waterway of the United States, each Owner had been required, consistent with the federal navigational servitude, to obtain a § 10 permit prior to laying a pipeline. In each permit, Owners: acknowledged they were not receiving an interest in property; and agreed that, should the Corps require, Owners would remove any obstruction (e.g., its pipeline) at no cost to the government.

Our court's decision in 1993 in ***UTTCO*** held that § 10 permit-holders must pay for the relocation of any portion of a pipeline located within the original permit area. ***UTTCO***, 7 F.3d at 441. The permits in ***UTTCO***, as in this action, required removal of obstructions "without expense to the United States," but did not explicitly require owners to bear

the cost. ***Id.*** at 439. Nevertheless, our court held that the federal navigational servitude provided authority to enforce the terms of those permits at owner expense.

> [N]o one seriously contests the rule that the cost of relocating the portion of a pipeline lying between the original banks of the bayou (i.e., the work that was either "herein authorized" under ¶ (*f*) of the permits or covered by the navigational servitude) must be borne by the pipeline owner.

Id. at 444.

It was only after ***UTTCO*** that the Corps, in October 1995, issued written guidance—Policy Guidance Letter 44—for when it will assert its power to require removal of an obstruction to navigation at the expense of the owner of the obstruction. When Texas and the Port determined that they did not have the authority to require relocation of more than 100 pipelines under the navigable waterway, they requested the Corps to secure their relocation under the authority of its federal navigational servitude and the corresponding § 10 permits.

The Chief's Report was then sent by the Corps to Congress concerning this authority and with a specific cost-allocation provision, noting that all relocation costs would be borne by Owners. Congress relied on this report in deciding to approve the project and formally incorporated the Chief's Report in the authorizing legislation — WRDA-96. Pub. L. No. 104-303, § 101(a)(30), 110 Stat. 3658, 3662-66 (1996).

Despite this, the district court ruled: "The adoption of the chief's report went only as far as its engineering and design recommendations, not its admonishments on cost allocation." ***Air Liquide***, No. H-98-3982 at 5. The cost data in the LRR, incorporated in the Chief's Report, reflects, however, that relocation costs are to be borne by Owners. For example, the LRR includes tables listing individual Owners, their specific § 10 permits, and the number and size of their pipelines.

Indeed, portions of the LRR discuss requiring Owners to bear pipeline relocation costs according to the § 10 permit power. (*E.g.*, "The cost for removal and replacement of pipelines and docking facilities located within the area of navigation servitude are not included in the cost estimate because these costs are owner costs, not project costs.")

Owners contend, erroneously, that WRDA-86 precludes the Corps' exercising § 10 permit authority to enforce the navigational servitude. For obvious reasons, Congressional waiver of this servitude must be express. ***See, e.g., United States v. Cherokee Nation of Okla.***, 480 U.S. 700, 707 (1987) (holding waiver of navigational servitude "will not be implied, but instead must be 'surrendered in unmistakable terms'") (quoting ***Bowen v. Public Agencies Opposed to Social Security Entrapment***, 477 U.S. 41, 52 (1986)). There is no waiver in WRDA-86; the federal navigational servitude remains.

In sum, the Corps properly exercised its navigational servitude over the pipelines and waterway covered by the § 10 permits, requiring Owners to remove those pipelines at their expense.

B.

In their conditional cross-appeal, Owners claim the project is for a deep-draft harbor within the meaning of WRDA-86: one "*authorized* to be constructed to a depth of more than 45 feet." 33 U.S.C. § 2241(1) (emphasis added). As discussed, WRDA-86 provides that obstruction relocation costs for a deep draft harbor project are to be divided equally between Owners and the non- Federal interest (here, the Port). 33 U.S.C. § 2211(a)(4).

In support, Owners contend that the design depth of 47 feet for the entrance channel of the project makes it one for a deep-draft harbor. They contend also that over-depth dredging and advance maintenance have resulted in a channel depth greater than 45 feet.

The reasoning by the district court provides the correct answer to these contentions: "The depth of the entrance is *not* the depth of the channel. . . . When it adopted the chief's report, Congress *authorized* the construction of a 45-foot-deep harbor, *not* a deep-draft harbor." ***Air Liquide***, No. H-98-4982 at 4 (emphasis added).

III.

For the foregoing reasons, those parts of the judgment allocating the pipeline relocation cost to the Port and amending the Corps' removal-notices to Owners are **VACATED**; that part of the judgment concerning the project not being for a deep-draft harbor is **AFFIRMED**; and judgment is **RENDERED** for the Corps and Port.

VACATED in PART; AFFIRMED in PART; and RENDERED.

APPENDIX B — OPINION, ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS ENTERED JANUARY 25, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

CIVIL ACTION H-98-3982

AIR LIQUIDE AMERICA CORP., *et al.*,

Plaintiffs,

versus

U.S. ARMY CORPS OF ENGINEERS, *et al.*,

Defendants.

Opinion on Summary Judgment

1. *Introduction.*

The Houston Ship Channel is to be widened and deepened, requiring the relocation of pipelines that pass under it. The owners of the pipelines have been told to move their pipelines at their own expense. The Port of Houston Authority is required by federal and Texas law to pay for the relocation.

2. *Background.*

The Water Resources Development Act of 1996 authorized expansion of the Houston-Galveston Navigational

Channel. The project is to be completed substantially in accordance with the report of the chief engineer of the United States Army Corps of Engineers. The report placed the expense of pipeline removal solely on the pipeline owners; the act says that the removal is to be accomplished at non-federal expense.

The plaintiffs have licenses to run pipelines under the channel. More than 65 pipelines cross beneath the channel, and they must be lowered to complete the project. The average cost of relocation is about one million dollars per pipeline. The pipeline owners agreed in paragraph five of each license to remove or relocate the pipeline at its own cost if the pipeline interferes with the deepening or widening of the channel. At the Port's request, the Corps told the owners to remove the pipelines at their own expense. The owners want the Port to pay for the removals under the general cost allocation plan of the Water Resources Development Act of 1986.

Both sides have moved for summary judgment. The plaintiffs assert that (a) the Corps's notices to remove are void, (b) the Port required the removal under the Texas Water Code, and (c) the Port has taken property without compensation. The Corps challenges the court's jurisdiction to hear the case. The Port claims that the 1996 act assigns the costs to the pipeline owners and that the owners have agreed to remove the pipelines at their own expense.

Appendix B

3. *The 1996 Act.*

The Water Resources Development Act of 1996 authorized the expansion of the ship channel. The act permits a project to be carried out "in accordance with the plans, and subject to the conditions" of the report of the chief of engineers. Public Law No. 104-303, 110 Stat. 3662. The chief's report was not attached to the public law and was not introduced in or debated in Congress, much less adopted by both houses and presented to the president. The act itself—the law—requires that pipeline removal in the Houston-Galveston channel be completed at "non-Federal expense." 110 Stat. 3666. The pipeline owners and the Port are the only two bodies involved in the expansion besides the national government. The statute does not specify a division of costs among the non-federal interests; the chief's report assigns the relocation costs to the owners.

4. *The 1986 Act and the Texas Water Code.*

The Water Resources Development Act of 1986 requires the non-federal interest to relocate or assure the relocation of pipelines as necessary to carry out a project. If the project is a deep-draft harbor, half the cost is paid by the non-federal interest and half by the pipeline owners; no division of costs is specified for projects other than deep-draft ones. 33 U.S.C. § 2211(a)(4). By law, the non-federal interest in this case is the Port of Houston. 33 U.S.C. § 2241(7), 42 U.S.C. § 1962d-5b(b).

If the Port requires the relocations, it does not matter whether it removes the pipelines itself or merely assures that

it is done; the Texas Water Code obliges the Port to pay for the relocations at its sole expense. TEX. WATER CODE § 60.102.

5. *Jurisdiction.*

A. *Federal Court Jurisdiction.*

The Corps asserts that this court lacks jurisdiction; the case should be heard in the Court of Federal Claims because, though their artful pleading hides the claim, the owners implicitly request compensation in excess of $10,000 for pipeline removal. The complaint reveals no artifice. The Corps is not being sued for money damages; the only claims against it are for declaratory relief. This court has jurisdiction.

B. *Standing.*

The Corps claims that the owners do not have standing to sue because their interests are not protected by the 1986 act. The statute, it argues, is meant to set guidelines for the submission of Corps reports, not assign payment obligations. This is incorrect. The 1986 act may be entirely procedural; all laws, from the Constitution down, regulate government processes to some extent. These procedures, however, are in place to protect the interests of citizens and set standards for assigning obligations. The plaintiffs' pipelines cross under the channel. They have been told to move them, which takes planning and money. The Corps cannot issue notices requiring the owners to pay for relocation and then claim that the statute specifying who pays for relocation does not protect the

owners' interests. The owners have a personal stake in the process dictated by the act and have standing to sue.

C. *Final Agency Action.*

The Corps argues that the notices are not final agency action because they do not specify a consequence for noncompliance. Agency action is final if it imposes an obligation. *See United States Dep't of Justice v. Federal Labor Relations Auth.*, 727 F.2d 481, 493 (5th Cir. 1984). The notices to remove require the owners to relocate the pipelines. The implied consequence is seizure of the pipelines through revocation of the licenses to cross the channel. The obligation is immediate and direct because the relocation must be completed by a date certain and the owners must move the pipelines. The removal letters are final agency action.

D. *Ripeness.*

The plaintiffs argue that the notices are invalid because of their depth requirement. The Corps argues that the notices have only a general depth and that the claim will not be ripe for review until it issues permits with a specific depth. The plaintiffs' basic contention, however, is that the notice letters themselves are not valid; it has nothing to do with new permits. The pipelines must be moved to some lower depth. The particular depth ultimately chosen does not matter. The notices require removal of the pipelines; the validity of those notices is clearly ripe for review.

Appendix B

6. *Deep-Draft Harbor.*

The amount paid by the owners and the Port depends on whether the project is a deep-draft harbor. A deep-draft harbor is constructed to a depth of more than 45 feet. 33 U.S.C. § 2241(1). The entrance to the expanded Houston Ship Channel will be 47 feet deep and 800 feet wide. The channel itself is described as 45 feet deep by 530 feet wide. It needs to be dredged to a depth of more than 45 feet for maintenance.

The depth of the entrance is not the depth of the channel. There must necessarily be a transition from the sea floor to the channel bottom; this length is a trivial portion of the entire project. No pipelines cross the entrance. The critical depth is the channel's design depth. When it adopted the chief's report, Congress authorized the construction of a 45-foot-deep harbor, not a deep-draft harbor. Silt accumulates and is dredged; the actual depth of the harbor will vary with the maintenance cycle. No matter how deep the channel must occasionally be dredged to maintain a specific depth, Congress approved a harbor with an official depth of 45 feet; it did not endorse a deep-draft harbor and then require that harbor to be listed as 45 feet deep.

7. *Payment.*

Neither the 1996 nor 1986 acts of Congress explicitly allocate the costs of relocating the pipelines, but Texas law—the same authority that created the Port—says the Port must pay if it requires the removal. TEX. WATER CODE § 60.102. The Port has required the removal by (a) initiating and financing the project, (b) signing a project cooperation

agreement with the Corps, and (c) requesting removal notices from the Corps. The argument that the Port has not "required" the relocation of the pipelines is unsound. The Corps issued the removal notices at the Port's request, acting as the Port's agent in requiring the owners to relocate the pipelines. The Port cannot escape its obligation to pay by shunting its order through an agent.

The defendants argue that the chief's report states that the pipelines will pay for removal, and Congress adopted this recommendation when it mandated in the 1996 act that the project take place in substantial accordance with the chief's report and that pipeline relocation would occur at non-federal expense. This is not correct. Congress authorized the project and design described in the report, not every sentence between the report's covers. The adoption of the chief's report went only as far as its engineering and design recommendations, not its admonishments on cost allocation. The prohibition on federal payment for relocation expenses is not an implicit embrace of the report's payment recommendations; it is a warrant that, though the Port must perform the removal or assure it is performed, the federal government is not going to pay for it.

Congress intended the cost-sharing scheme of the 1986 act to remain in effect; that scheme, after looking to the Texas Water Code, requires the Port to pay for the relocation.

8. *Contractual Agreement.*

The Port argues that the owners agreed in paragraph five of the licenses to pay for the removal of the pipelines at the

Port's request. The licenses are preempted by the Texas Water Code. The statute was passed to limit the power of bodies like the Port to extract payment or performance from groups that contract with them. The Port, as a creature of the state, is bound by the regulations the state places on it. This includes the requirement that the Port pay for any relocation that it requires of a pipeline owner.

9. *Conclusion.*

This court has jurisdiction to hear the suit against the Corps. The Houston Ship Channel project authorized by the Water Resources Development Act of 1996 will not create a deep-draft harbor. The Port has required the removal of the pipelines. The cost-sharing plan created by the Water Resources Development Act of 1986, combined with Texas Water Code, requires the Port to pay for the pipeline relocation. The 1996 act does not require the pipeline owners to pay for the relocation of their pipelines, and the licenses' payment provisions are preempted by the Texas Water Code.

The plaintiffs' motion for summary judgment will be granted in part; the defendants' motions for summary judgment will be denied. The notice letters from the Corps will be amended to require the Port to pay for the pipeline removals. The remaining claims will be dismissed as moot.

Signed January 25, 2002, at Houston, Texas.

s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

CIVIL ACTION H-98-3982

AIR LIQUIDE AMERICA CORP., *et al.*,

Plaintiffs,

versus

U.S. ARMY CORPS OF ENGINEERS, *et al.*,

Defendants.

Order and Final Judgment

1. The plaintiffs' motion for partial summary judgment is granted in part.

2. The Corps's motion for summary judgment is denied.

3. The Port's motion for summary judgment is denied.

4. The notice letters issued by the U.S. Army Corps of Engineers to the plaintiffs are amended to require the Port of Houston Authority to pay for the relocation of the pipelines.

5. All other claims are dismissed without prejudice.

Signed January 25, 2002, at Houston, Texas.

Appendix B

s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED APRIL 1, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 02-20442

AIR LIQUIDE AMERICA CORPORATION; EGP FUELS COMPANY; EQUILON PIPELINE COMPANY, LLC; EXXON PIPELINE COMPANY; FLORIDA GAS TRANSMISSION COMPANY; HOUSTON PIPE LINE CO; HSC PIPELINE PARTNERSHIP LP; MOBIL CHEMICAL COMPANY, an unincorporated division of Mobil Oil Corporation; MOBIL PIPELINE COMPANY; SEADRIFT PIPELINE CORPORATION; TE PRODUCTS PIPELINE COMPANY LIMITED PARTNERSHIP; TEXAS EASTERN TRANSMISSION CORP; UCAR PIPELINE INCORPORATED; CHEVRON CHEMICAL CO; CHEVRON PIPELINE CO; DYNEGY MIDSTREAM SERVICES; TEPPCO CRUDE OIL LLC;

Plaintiffs - Counter Defendants - Appellees-Cross-Appellants

DUKE ENERGY TRANSPORT AND TRADING COMPANY

Plaintiff - Counter Defendant - Appellee

Appendix C

AIR PRODUCTS INCORPORATED; AIR PRODUCTS MANUFACTURING CORPORATION; BLACK MARLIN PIPELINE COMPANY; TEJAS SHIP CHANNEL LLC; TEJAS SOUTH PIPELINE PARTNERSHIP

Intervenor Plaintiffs - Appellees-Cross-Appellants

v.

US ARMY CORPS OF ENGINEERS

Defendant - Counter Claimant - Appellant-Cross-Appellee

PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY, TEXAS

Movant - Appellant-Cross-Appellee

AIR LIQUIDE AMERICA CORPORATION; EGP FUELS COMPANY; EQUILON PIPELINE COMPANY LLC; EXXON PIPELINE CO; FLORIDA GAS TRANSMISSION COMPANY; HOUSTON PIPE LINE CO; HSC PIPELINE PARTNERSHIP LP; MOBIL CHEMICAL COMPANY, an unincorporated division of Mobil Oil Corporation; MOBIL PIPELINE COMPANY; SEADRIFT PIPELINE CORPORATION; TE PRODUCTS PIPELINE COMPANY LIMITED PARTNERSHIP; TEXAS EASTERN TRANSMISSION CORP; UCAR PIPELINE INC

Plaintiffs - Appellees-Cross-Appellants

Appendix C

DUKE ENERGY TRANSPORT AND TRADING COMPANY

Plaintiff - Appellee

v.

PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY, TEXAS

Defendant - Appellant-Cross-Appellee

Appeals from the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Opinion 1/30/04, 5 Cir., _____, _____ F.3d _____)

Before BARKSDALE, DeMOSS, and BENAVIDES, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

* * *

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* Judges King, Higginbotham, Jones, Wiener, Dennis, and Clement did not participate in the consideration of the petition for rehearing en banc.

Appendix C

ENTERED FOR THE COURT:

s/ Rhesa H. Barksdale
United States Circuit Judge

APPENDIX D — RELEVANT STATUTE

33 U.S.C. § 2201

§ 2211. Harbors

(a) Construction

(1) Payments during construction

The non-Federal interests for a navigation project for a harbor or inland harbor, or any separable element thereof on which a contract for physical construction has not been awarded before November 17, 1986, shall pay, during the period of construction of the project, the following costs associated with general navigation features:

(A) 10 percent of the cost of construction of the portion of the project which has a depth not in excess of 20 feet; plus

(B) 25 percent of the costs of construction of the portion of the project which has a depth in excess of 20 feet but not in excess of 45 feet; plus

(C) 50 percent of the cost of construction of the portion of the project which has a depth in excess of 45 feet.

(2) Additional 10 percent payment over 30 years

The non-Federal interests for a project to which paragraph (1) applies shall pay an additional 10 percent of the cost of the general navigation features of the project in

cash over a period not to exceed 30 years, at an interest rate determined pursuant to section 2216 of this title. The value of lands, easements, rights-of-way, and relocations provided under paragraph (3) and the costs of relocations borne by the non-Federal interests under paragraph (4) shall be credited toward the payment required under this paragraph.

(3) Lands, easements, and rights-of-way

Except as provided under section 2283(c) of this title, the non-Federal interests for a project to which paragraph (1) applies shall provide the lands, easements, rights-of-way, and relocations (other than utility relocations under paragraph (4)) necessary for the project, including any lands, easements, rights-of-way, and relocations (other than utility relocations accomplished under paragraph (4)) that are necessary for dredged material disposal facilities.

(4) Utility relocations

The non-Federal interests for a project to which paragraph (1) applies shall perform or assure the performance of all relocations of utilities necessary to carry out the project, except that in the case of a project for a deep-draft harbor and in the case of a project constructed by non-Federal interests under section 2232 of this title, one-half of the cost of each such relocation shall be borne by the owner of the facility being relocated and one-half of the cost of each such relocation shall be borne by the non-Federal interests.

Appendix D

(5) Dredged material disposal facilities for project construction

In this subsection, the term "general navigation features" includes constructed land-based and aquatic dredged material disposal facilities that are necessary for the disposal of dredged material required for project construction and for which a contract for construction has not been awarded on or before October 12, 1996.

No. 04-14

IN THE

Supreme Court of the United States

AIR LIQUIDE AMERICA L.P., *et al.*,

Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS and PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY, TEXAS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY, TEXAS

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QUESTION PRESENTED FOR REVIEW

Petitioners actually present only one question for review, although they have stated it in two different ways. Respondent believes that issue is more appropriately phrased as follows:

> Did the Fifth Circuit err in holding that the authority of the U.S. Army Corps of Engineers under the navigation servitude to require the owners of private pipelines obstructing a federal navigation project to remove those pipelines at the owners' expense was not withdrawn by the Water Resources Development Act of 1986?

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STATUTORY PROVISIONS INVOLVED

In addition to the portions of 33 U.S.C. § 2211 provided in the appendix to the petition, respondents believe that provisions of the Water Resources Development Act of 1996, U.S.C. § 2201, as well as § 60.102(a) of the Texas Water Code Ann. are involved in the issues before the Court. Therefore, these provisions are reproduced in an appendix to this opposition.

STATEMENT OF THE CASE

SUMMARY

Respondent Port of Houston Authority of Harris County, Texas (hereinafter sometimes referred to as "the Port") respectfully requests that this Court deny the Petition for Writ of Certiorari. There is no compelling reason for review of the well-reasoned and articulated judgment of the Fifth Circuit. Petitioners admit that there is no split of authority among the Circuits with respect to any issue in this case. In fact this is not a dispute over the inherent authority of Congress or the Army Corps of Engineers with respect to the navigation servitude. The underlying issue is whether Congress waived that authority in the Water Resources Development Act of 1986 Pub. L. No. 96-662, 100 Stat. 4082, codified at 33 U.S.C. §§ 2201, *et seq.* ("WRDA-86").

This Court consistently has held that any waiver of the navigation servitude must be explicit and may not be implied. However, petitioners can point to no explicit language in WRDA-86 to support their position that Congress "necessarily" intended to waive the servitude over utilities in cost-sharing navigation projects. Furthermore, the

legislative history directly contravenes petitioners' claim. Therefore there is no basis for review of the holding of the Fifth Circuit that "the Corps properly exercised its navigational servitude."

Finally, the Fifth Circuit held that even if Congress had waived the authority of the Corps to impose the cost of removal on the owner of the pipelines, the project remains a federal project, and the requirement that the owners move their pipelines was derived from the Congressional power to regulate interstate commerce, not from any authority or power of the Port. Since the Port did not require the removal of the pipelines, Texas law does not impose the cost on the Port. There also is no basis for review of this alternative holding. Significantly, the owners of over 50% of the affected pipelines (2R246-47) have chosen to concede the validity of the Fifth Circuit judgment, and do not petition this Court for certiorari.

FACTUAL CONTEXT

• The Federal Project To Deepen And Widen The Houston Ship Channel

The Houston ship channel (sometimes hereinafter referred to simply as "the channel") is a navigable waterway of the United States. 2R247-48.[1] It has been widened and deepened by federal projects a number of times since

1. Citations to the record on appeal are in the same format as record references in the Petition, indicated by "__R__," citing first by volume and then by page. It should be noted, however, that the record was numbered backward by the District Clerk. Therefore, in a citation such as "2R247-48," page 248 is actually the first page and page 247 is the next.

Congress first authorized its construction in the late nineteenth century. The most recent project had its origins in 1967, when the United States House Committee on Public Works adopted a resolution authorizing the Board of Engineers for Rivers and Harbors to review their reports on several navigation projects in the Galveston Bay area of Texas, including the Houston ship channel, to determine whether those projects should again be improved. 20R5216. The initial review, called the Reconnaissance Report, was completed in 1980. It demonstrated that modifications necessary to improve the efficiency and safety of the Galveston Bay channels were feasible and recommended that studies to accomplish those goals continue into the feasibility phase. 2R245.

The feasibility study for the Houston and Galveston channels was completed in July, 1987. 2R245. Although this first study suggested deepening the channels to 50 feet, further studies were recommended by the Board of Engineers in 1988 and by the Chief of Engineers in 1990. 2R244. The Galveston District and Southwestern Division of the Corps of Engineers undertook those studies and published a draft report for public review and comment in May 1995 that recommended proceeding with a specific 45-foot project to deepen and widen the channel. 10R2406-11R3046. The Port of Houston was designated as the local sponsor. The final report of the Corps of Engineers recommending the project (hereinafter referred to as the "LRR") was published in November 1995.[2]

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2. The project is officially titled "Houston-Galveston Navigation Channels, Texas."

- **The Pipelines And The Navigation Servitude**

The studies and reports revealed that over a hundred private pipelines under the Houston ship channel would have to be removed to accommodate the project. 11R2945. The total cost to remove these pipelines was estimated by the Corps in 1995 to exceed $115,000,000. 8R2103. This cost alone would have increased the total cost of the project by almost fifty percent. (*See* Table 25, 8R1971.) However, since the channel is a navigable waterway of the United States, the owner of each pipeline, prior to placing the line under the channel, had obtained permission from, and executed a "Section 10 permit" with, the Department of the Army or the War Department. 2R247. In each such permit, the pipeline owner (1) acknowledged that it was not receiving an interest in property, and (2) explicitly agreed that, should the Corps require, the pipeline owner would remove any obstruction (*i.e.*, its pipeline) at no cost to the government.[3] The Corps determined to exercise its Section 10 Permit authority, assert the navigation servitude, and require the owners to move the pipelines at their own expense so that this cost would not be a part of the total project cost.

The Petition for Writ misleadingly suggests that the Corps' intent was somehow hidden in administrative minutiae relating to environmental concerns. Petitioners state: "Buried in the two volumes [of the LRR] were suggestions that

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3. An example is found at 14R3654-57. The Port (which owns the land underneath the channel), also had licenses with the owners. These provided that, if needed to accommodate deepening and widening the channel, the owner will "at its cost and expense and without cost or expense to the Port . . . remove . . . or otherwise conform" its pipelines to the project. An example of one of these licenses is found at 13R3546-57.

Owners pipelines should be 'removed' along with other obstructions to the channel improvements. 8R.1981." (Pet. pg. 6.) This statement significantly distorts the record.

The May, 1995 public notice for the Corps' draft LRR report, under a bold heading, "**Project Economics**", explicitly stated that "costs associated with removing or lowering about 130 pipelines which are considered removals rather than relocations will be paid for 100 percent by the pipeline owner." 9R2395. Furthermore, the "**Recommended Plan**" section of the draft report itself contained approximately four pages of discussion on "Removals and Relocations," including a table of the pipelines that would be required to be removed. That section explicitly states that "We recommend the initial use of the Section 10 permit authority and the navigation servitude to cause removals at the owners' expense. . . ." The pipeline owners were mailed copies of the notice and the draft report (9R2361-65, 2368-69), but provided no comments or objections to the Corps. 2R240.

Thereafter, in November 1995, copies of the final LRR report were also sent to the pipeline owners for review and comment. 2R239, 9R2162-2211. The final LRR contains multiple detailed references to the fact that the pipeline owners are to pay the costs associated with moving their pipelines to accommodate the Project, starting with the "***Recommended Plan***" itself. That segment of the LRR contains an entire section on "Removals and Replacements." The very first sentence of that section states: "The costs for removal and replacement of pipelines and docking facilities within the area of navigation servitude are not included in

the baseline cost estimate because these costs are ***owner costs***, ***not project costs***." 8R2000A (emphasis added).[4]

Furthermore, the "***Recommended Plan***" discusses the issuance of permits by the Corps under Section 10 of the River and Harbors Act of 1899, (now codified at 33 U.S.C. § 403 (2001)), and specifies that all of the pipelines "are subject to the navigation servitude." 8R1992. The "Channel Design" section of the "***Recommended Plan***" states:

> The channel deepening and widening will make it necessary for some pipelines which cross the channel and dock facilities along the channel to be removed and, in most instances, replaced. Since the pipelines and docks are within the area subject to navigation servitude, the costs for these removals and replacements are not a part of the total project cost.

8R2012.

The segment of the LRR entitled "***Cost Allocation and Apportionment***" then has a detailed discussion of pipeline removals and again expressly states that these will be accomplished at owner cost:

> Project implementation will also require the owners of some pipelines, docks, or other structures to remove and replace their facilities ***at their own cost***. These costs were included in

4. At various places in the record on appeal, a page was not numbered by the clerk. On such occasions, the page is designated with the suffix "A." For example, in this citation, page 2000A is the page between page 2000 and page 2001.

> the economic evaluation to determine the economic feasibility of the recommended channel improvements; however, they were not included in the allocation and apportionment of project costs between the Federal government and project Sponsors. Corps of Engineers policy stipulates that facilities that are within the jurisdiction of navigation servitude and impede authorized navigation improvements shall be removed by the owner and ***at the owner's expense***.

8R1969 (emphasis added). The LRR then lists, in Table 27 ("Pipelines and Docks to be Removed/Replaced at Owner Cost"), each specific pipeline that the owners are required to move at their own cost. 8R1967-68A. That list includes each of the pipelines at issue in this case.

Despite this detailed discussion of the Corps' intent to exercise the servitude and impose the costs of removal on the owners of the pipelines, no comments or objections were provided by the owners. 2R239. Therefore, subsequent to the public review and comment period, the LRR, as published, was incorporated in the Chief of Engineers' report of May 9, 1996 ("Chief's Report"), (2R238) which Report was then submitted to the Secretary of the Army for transmission to Congress. 8R2113. The Chief's Report recommended that the project be implemented generally in accordance with the LRR. 8R2112.

- **Congressional Authorization Of The Project**

The project was authorized by the Water Resources Development Act of 1996, § 101(a), 110 Stat. 3658 at 3662, 3666. ("WRDA-96") That Act provides that the project will

be carried out by the Secretary of the Army "substantially in accordance with the plans, and subject to the conditions, described in the [Chief's Report]." This authorization incorporated into the statute that portion of the recommended plan that provided that the Corps would exercise its Section 10 permit authority and require the pipeline owners to move their pipelines at their own expense. *See Anderson v. Seeman*, 252 F.2d 321 (5th Cir.), *cert. denied*, 358 U.S. 820 (1958); and *Levingston Shipbuilding Co. v. Ailes*, 239 F. Supp. 775 (E.D. Tex. 1965), *aff'd*, 358 F.2d 944 (5th Cir. 1966). Congress was aware that one of the conditions in that report was for the owners to pay the cost of removing their pipelines. The report of the House Committee on Transportation and Infrastructure explicitly states that "[t]he owners of approximately 120 pipelines located beneath the channel ***will be required to bear the [c]ost of facility removal and replacement*** ($110,100,000)." 15R4109 (emphasis added).[5]

In accordance with that Congressional authorization, the Department of the Army and the Port signed a Project Cooperation Agreement and the Corps sent "Notice to Remove" letters to the pipeline owners, asserting the navigation servitude, enforcing the Section 10 permit conditions, and requiring the owners to move, at their own expense, those pipelines that were obstructing the project. 2R237. The litigation underlying this petition then ensued, the history of which is accurately summarized in the petition at pgs. 9-11.

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5. Because of the effect of its alternative holdings the Fifth Circuit did not need to reach, and did not reach, respondent's position that WRDA-96 specifically authorized the imposition of the costs of pipeline removals on the owners. In the unlikely event this Court grants the Petition for Writ and reverses on each of the two grounds supporting the Fifth Circuit judgment, the question of the scope of WRDA-96 would remain to be addressed by the Court of Appeals.

REASONS FOR DENYING THE PETITION

NEITHER OF THE ALTERNATIVE HOLDINGS SUPPORTING THE FIFTH CIRCUIT JUDGMENT REQUIRES REVIEW.

I. The Corps Properly Exercised the Navigation Servitude.

Petitioner's assertion that the judgment of the United States Court of Appeals for the Fifth Circuit should be reviewed because it "erroneously expands the constitutional navigational servitude doctrine" is itself based on the false premise that in WRDA-86 Congress implicitly waived the historical authority of the United States Army Corps of Engineers, thereafter denying the Corps the ability to enforce its Section 10 permits in relocating utilities in conjunction with federal navigation projects. Only by asserting that WRDA-86 *restricts* the servitude are petitioners able to argue that the Fifth Circuit's judgment improperly *expands* the servitude. However, this assertion distorts the language of WRDA-86 itself, misinterprets the legislative history, and disregards the prior admonitions of this Court that *any* waiver of the servitude must be express. (*See United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987)).

Petitioners admit that the navigation servitude is a Congressional power that has been delegated to the Corps, and that the Corps can require removal of obstructions from navigable waters at no cost to the federal government (Pet. pg. 11). Furthermore, petitioners do not deny that application of the servitude repeatedly has been recognized to include the power to require private parties to undertake substantial and expensive alterations or removals themselves,

without compensation, or to otherwise pay the costs of removing structures owned by them that interfere with navigation. *See, e.g., Louisville Bridge Co. v. United States*, 242 U.S. 409, 415, 424-25 (1917) (upholding decree requiring bridge owner, at its cost, to comply with Secretary of War's notice to alter bridge); *United States v. Alameda Gateway Ltd.*, 213 F.3d 1161, 1163, 1166 (9th Cir. 2000) (affirming a grant of summary judgment to the Corps imposing costs of removal on private facility owner, where the owner itself refused to move the facility); *Potomac River Ass'n v. Lundenberg Md. Seamanship Sch., Inc.*, 402 F. Supp. 344, 355-56 (D. Md. 1975) (determining that "reflection requires the conclusion" that the Corps has been delegated the cost allocation decision *de facto*); *United States v. 597.75 Acres of Land*, 241 F. Supp. 796, 799 (W.D. La. 1965) (recognizing constitutionality of government requiring owners to lower pipelines at their own expense).

The Fifth Circuit judgment that petitioners wish this Court to review rests in part on a prior decision of the Fifth Circuit that directly addresses this authority of the Corps. *United Texas Transmission Co. v. United States Army Corps of Engineers*, 7 F.3d 436 (5th Cir. 1993), *cert. denied*, 512 U.S. 1235 (1994) ("*UTTCO*"). The facts are remarkably similar to those giving rise to this case. Two pipelines were installed under a Texas bayou pursuant to Section 10 permits issued by the Corps. Thereafter, Congress authorized a federal project for deepening and widening the bayou, just as was done here, by adopting the recommended plan of the Chief of Engineers. *See* Flood Control Act of 1965, Pub. L. No. 89-298, 79 Stat. 1073, 1078 (1965). The responsibilities for that project were split between the Corps and the local drainage district. *See UTTCO*, 7 F.3d at 438.

In the exercise of the navigation servitude, the Corps informed the plaintiff that it would be required to remove its pipelines at its own cost. The plaintiff refused to do so without assurance that it would be reimbursed for the costs by the drainage district. *Id.* at 439. The primary issue in dispute was whether the drainage district was required to pay for the pipeline removals or whether the Corps, through the exercise of its Section 10 permit power, could force the pipeline owner to absorb the costs. *See id.*

In analyzing the Corps' authority as applied to property both inside and outside the physical boundaries of the navigation servitude, the court stated:

> Solely for the sake of clarity and perspective, then, we reiterate the truism that the pipeline owner must bear the cost of relocation work within the original permit area, i.e., the boundaries of the bayou existing when the § 10 permits were granted. . . . ***[The] permit language clearly gives the Corps the authority to order the relocation of pipelines inside the boundaries of the original permit area at the expense of the pipeline owners***.

UTTCO, 7 F.3d at 441-42 (emphasis added).

Petitioners relegate their only mention of the *UTTCO* case to a footnote, arguing that the Fifth Circuit attempts to "bolster its approval of the Corps' end run by relying on and extending" *UTTCO*, and asserting that the case does not support the use of the navigation servitude in this instance because it does not deal with the WRDA-86 requirement that the local sponsor "perform or assure performance" of relocations. (Pet. pg. 19 n.8) While it is true that the facts in

the case predate WRDA-86, *UTTCO* is relevant both because it explicitly recognizes the historical authority of the Corps to impose the expense of removal on the pipeline owners, and because it addresses the effect of language such as "perform or assure performance" on that authority. Nonetheless, while dismissing UTTCO with a footnote, and providing no reference to express statutory language or judicial precedent, petitioners argue that by assigning "responsibility for utility relocations to the local sponsor . . . Congress necessarily decided that the navigational servitude, a federal power, would not be asserted to effectuate utility relocations on cost-sharing navigation projects." (Pet. pgs. 19-20) This simply is a false premise based on a faulty construction.

A. Petitioners' Faulty Construction.

Early in the petition it is asserted that the Corps no longer has the authority to enforce its Section 10 permits against the permittees by requiring them to remove permitted facilities at their own expense because WRDA-86 adopted the *rule* that state law must decide which party — local sponsor or facility owner — is to shoulder utility relocation costs associated with any joint federal/state navigation project. (Pet. pg. 4) The statutory source for this "rule" is never stated clearly in the Petition. Somewhat later, as the second bullet point in their "reasons for granting the petition," petitioners assert that the Fifth Circuit judgment "interferes with congressionally mandated rules that place responsibility for removal *costs* on the local public sponsor, rather than on private property owners." (Pet. pg. 12) (emphasis added) Again, petitioners fail to identify explicitly the statutory source for the congressional "rules" that place the responsibility to pay on the local sponsor. However, since

the petition asserts that there is only one statutory provision involved in their analysis, petitioners are presumed to base both these arguments on that portion of 33 U.S.C. § 2211(a)(4) that reads: "The non-Federal interests. . . shall perform or assure the performance of all relocations of utilities necessary to carry out the project. . . ."

As is apparent, the statute expressly says nothing about imposing the "cost" on anyone. If petitioners' argument is to succeed, that language must be *construed* to mean something not otherwise clearly expressed. For example, the phrase "perform or assure the performance of" must be construed to mean "pay for" — otherwise there is no Congressionally mandated rule that places responsibility for removal *costs* on the local sponsor, as petitioners assert. However, this is the same language that petitioners also assert must be construed to mean that Congress intended to leave it to state law to determine whether or not the local sponsor is required to pay the costs. Which is the unambiguous meaning? Does the language mandate that the local sponsor has the responsibility for removal costs, (Pet. pg. 12), or that state law must decide if the local sponsor has to pay (Pet. pg. 4)? The answer is: neither. This provision adopts no "rules" as such, expressly says nothing about deferring to state law, and does not expressly preclude the local sponsor from requesting the Corps to cause the removal by exercising its Section 10 permit authority to enforce the navigation servitude.

Lacking any express statutory provision to support any "rule," petitioners are forced to the false assumption that "Congress *necessarily* decided that the navigational servitude, a federal power, would not be asserted to effectuate utility relocations on cost-sharing navigation projects." (Pet. pg. 20) (emphasis added) However, it is only

"necessary" to imply such a decision if one needs to create support for a "rule," which itself does not exist in the language of the statute. Rather than point to any provision of WRDA-86 to support this circular reasoning, petitioners simply argue from inferences they draw from comments found in the legislative history of WRDA-86 (Pet. pg. 15-17) and assert that this is proof of clear and unambiguous congressional intent. (Pet. pg. 23)

B. Legislative History Does Not Support Petitioners' Faulty Construction

The general rule articulated by this Court is that references to legislative history are acceptable only to resolve "statutory ambiguity." *Barnhill v. Johnson*, 503 U.S. 393, 401 (1992); *see also Toibb v. Radloff*, 501 U.S. 157, 162 (1991). And the Court has generally taken a narrow view of what constitutes such ambiguous language. *See, e.g., Lamie v. United States Trustee*, 124 S. Ct. 1023, 1029-30 (2004). In any event, following this guidance, petitioners' attempted reliance on legislative history to support their position in this case can only be justified if the statutory language in question is ambiguous. However, this leaves petitioners in the position of arguing that although the statutory provision is so ambiguous one must turn to the legislative history in order to ascertain the congressional intent — the provision simultaneously is so clear that it "unambiguously" restricts the ability of the Corps to exercise the navigation servitude. Not a convincing basis for granting a writ of certiorari.

Furthermore, even the commentary that petitioners rely on does not explicitly state what petitioners assert. One must infer from the commentary that Congress "necessarily" decided to waive the servitude in these circumstances.

Not only is such inference improper, it ignores the immediately preceding paragraph of the commentary, which states:

> Except as provided in section 204, this section is not intended to place any new obligation on non-Federal interests to pay for relocations necessitated by commercial channel or harbor development involving depths of forty-five feet or less. This provision also *continues* the *current* policy that it is the responsibility of the non-Federal interest to ensure that the relocations necessary for such a project are accomplished.

H.R. Conf. Rep. No. 99-1013 at 205 (1986). (emphasis added).

This commentary makes it quite clear that, except as provided in section 204, Congress did not intend to change responsibility in any way going forward, and that it is the intent of Congress to "continue[s] the current policy." *Id.*

But what is the exception in section 204 and what is the "current policy?" Section 204 is entitled "Construction of Projects By Non-Federal Interest," and authorizes local sponsors to undertake their own non-federal harbor improvement projects. In those non-federal projects (as well as in federal projects deeper than 45 feet) § 2211(a)(4) of WRDA-86 specifies that one-half of the cost of each utility relocation shall be borne by the owner of the facility and one-half by the non-federal interest.[6] There is no commentary

6. It is for this reason that petitioners asked the courts below to hold, alternatively, that this project was a "deep draft harbor project" (Cont'd)

on § 204 in the House Conference Report relied on by petitioners. However, that report is not the sole piece of legislative history.

In Senate Report No. 99-126 there is a substantial discussion of this section authorizing non-federal harbor improvement projects. The significant paragraph is as follows:

> Where pipelines, cable, and related facilities must be relocated because non-Federal sponsors are constructing a harbor improvement under this section, such relocation or alteration cost shall be shared 50-50 between the non-Federal project sponsor and pipeline or cable owner. The full costs of upgrading or improving any such pipeline or cable shall be borne by the pipeline or cable owner. **The costs of relocation for a Federal project remain the responsibility of the pipeline or cable owners.**

Sen. Rep. No 99-126 at pg. 53 (emphasis added). Nothing needs to be inferred from that statement. It is truly direct, clear and unambiguous. WRDA-86 did not change the law for federal projects of 45 feet or less. The pipeline owners are to continue to pay the costs of relocation of their pipelines. Petitioners simply misconstrue the legislative history of WRDA-86 as well as the language of the statute itself.

(Cont'd)

within the meaning of the WRDA-86, and that therefore the cost of moving the pipelines had to be shared 50-50 between the Port and the pipeline owners. This theory was rejected by both the District Court and the Fifth Circuit. The petitioners have now abandoned that argument and no writ is sought for review of that holding.

C. Judicial Precedent Does Not Support Petitioners' Faulty Construction

One does not need to rely solely on a simple reading of the statute or its legislative history to rebut petitioners' premise that WRDA-86 "necessarily" waived the navigation servitude for future federal projects. There are two reported cases that provide substantial authority to rebut that premise, as well. In fact, there is no judicial authority that suggests otherwise. The first case was decided in the context of a pre-WRDA-86 project and the latter in the context of a project specifically authorized in WRDA-86.

1. Pre-WRDA-86

The *UTTCO* case, discussed at pgs. 8-9 above, involved a federal project authorized in 1965. Both the Chief's Report and the local cooperation agreement required that the local drainage district provide without cost to the United States "all the necessary lands, easements and rights of way" and make "all necessary alterations and relocations of structures and utilities." *UTTCO*, 7 F.3d at 438. This language is arguably even stronger than that in § 2211(a)(4) requiring the local sponsor to "perform or assure performance of" utility relocations. Just as petitioners do in this case, the owners argued in *UTTCO*, that, because the local sponsor was required to "make all necessary alterations and relocations of structures and utilities," the Corps was precluded from exercising its Section 10 permit authority to require the owner to relocate the pipelines at its sole cost. Both the district court and the Fifth Circuit rejected that argument. As the district court stated:

> This Court believes a reasonable interpretation [of the requirement in the agreement that the local

> sponsor provide rights of ways and easements and "make all necessary . . . relocations of structures"] only requires that the District pay to acquire those rights-of-way or easements that are not acquired through the power of the Corps. . . .

United Texas Transmission Co. v. United States Army Corps of Engineers, 772 F. Supp. 952, 955 (E.D. Tex. 1991). In affirming, the Fifth Circuit made clear that, as to the portions of the pipelines within the navigation servitude, the local sponsor was free to seek the exercise of federal power. *See UTTCO*, 7 F.3d at 439 n.3. This case provides assistance on two issues. One, it shows that the policy of the Corps prior to the enactment of WRDA-86 was to impose the "responsibility" for relocations on the local sponsor, while simultaneously exercising the servitude to enforce its Section 10 permits and forcing the permittees to move their pipelines at their own expense. Two, it is instructive in that the court rejected the argument made by the pipelines that by requiring the local sponsor to assume responsibility for relocations, the Corps was "necessarily" or implicitly precluded from imposing the relocation cost on the pipeline. It does predate WRDA-86. But it does not stand alone.

2. Post-WRDA-86

The dispute in *United States v. Alameda Gateway, Ltd.*, 953 F. Supp. 1106 (N.D. Cal. 1996) arose out of a federal project for the Oakland harbor that was authorized in WRDA-86. The City of Oakland was the local sponsor. The project required the removal of portions of two piers that extended into the harbor; and the Corps directed the owner, Gateway, to effect the removal. Gateway refused. The Corps then determined to exercise the navigation servitude and remove

the piers itself. It filed suit to enjoin Gateway from interfering with its plan, while reserving the right to later recover from Gateway the costs of removal. *Id.* at 1109. The issue of the effect of § 2211 arose in the context of this injunction proceeding. Citing § 2211(a)(3), Gateway argued that "the Water Resources Development Act of 1986 requires the City of Oakland, not the United States, to acquire whatever private property is needed" for the project, and Gateway also contended that the Corps was attempting to circumvent the project cooperation agreement, in which the City of Oakland had agreed to secure all necessary rights of way. The court considered these arguments by Gateway as "touching on the propriety of equitable relief," and rejected them as meritless, granting the injunction thereafter. *Id.* at 1113-14.

Although the *Alameda Gateway* case focused on the language of § 2211(a)(3) and the Project Cooperation Agreement, rather than the language of § 2211(a)(4), the argument by the facility owner in that case was essentially the same as the pipeline owners' argument in this case. And the result was the same. Despite the allocation of "responsibility" to the local sponsor, the Court held that the Corps' authority under the Rivers and Harbor Act of 1899 had not been waived. Once the injunction was obtained, the Corps removed the piers, and thereafter the Corps filed a separate suit against Gateway for reimbursement of the removal costs. Gateway again resisted the allocation of the costs of removal to it. The District Court granted summary judgment to the Corps, and the Court of Appeals affirmed in *United States v. Alameda Gateway Ltd.*, 213 F.3d 1161, 1163 (9th Cir. 2000).

D. No Implicit Waiver is Permitted

Finally, and perhaps most importantly, the Pipelines' argument that by assigning responsibility to the local sponsor to assure relocations Congress "necessarily" (implicitly) intended to waive the navigation servitude thereafter runs directly afoul of this Court's decision in *United States v. Cherokee Nation*, which held that any waiver of the navigation servitude and related federal authority over navigable waters "***will not be implied***, but instead must be 'surrendered in unmistakable terms.' " 480 U.S. at 707. (emphasis added) (quoting *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986)); *see also Lambert Gravel Co. v. J. A. Jones Const. Co.*, 835 F.2d 1105, 1110 (5th Cir.), *cert. denied*, 487 U.S. 1236 (1988). Section 2211(a)(4) of WRDA-86 does not expressly waive the servitude, and the language on which petitioners rely hardly constitutes an "unmistakable surrender" of the power to enforce Section 10 permits to require the pipeline owners to move the pipelines at their own expense.[7]

In fact, the provision at issue was intended to place no greater burden on the local sponsor than previous law placed. It means simply what it says — for projects of this depth, the local sponsor must either perform the necessary relocations

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7. Petitioners argue, without citation to any authority, that no waiver is required because the costs at issue "are non-federal and outside any proper application of the navigational servitude." This false syllogism is no answer. First, the imposition of the servitude virtually always implicates "non-federal costs." Second, the "waiver" is required to support petitioners argument that WRDA-86 restricts the application of the servitude and limits the Corps' ability to enforce its section 10 permits as it historically had done.

or assure that they are performed. Whether that may be accomplished by requesting the Corps to exercise the navigation servitude is not addressed, and there is no reason to imply that Congress intended to withdraw the authority of the Corps to enforce its permits as it has historically done. It should be noted that the one unambiguous meaning that cannot be denied is that the cost may *not* be imposed on the federal government. Yet, if the cost is imposed on the Port, as petitioners argue, this provision would be contravened. Under 33 U.S.C. § 2211(a)(2), those costs would have to be credited (in part) against the Port's other cost obligations, and would result in some tens of millions in additional costs to the federal government.[8] Recognizing the continuing authority of the Corps to exercise the servitude, as the Fifth Circuit did in its judgment, harmonizes the statutory language and avoids that result. In this case, the Corps acted within its historical authority, and there is no legitimate need to review the Fifth Circuit holding that the Corps properly exercised the navigation servitude.

II. Texas Law Does Not Impose The Cost Of These Removals On The Port.

Pervasive throughout petitioners' argument is the underlying premise that, but for the improper use of the navigation servitude, § 60.102(a) of the Texas Water Code would have imposed the cost of removal of the pipelines on the Port. Although that direct statement is never made, and can at best be found only as an implied conclusion to a footnote (Pet. pg. 16 at n.5), the premise permeates the Petition, and underlies its invective. However, this premise, too, is false, and was specifically rejected by the Fifth Circuit.

8. The amount would vary based on total construction costs and the amount of credits for other expenses borne by the Port.

Even if the Corps were prohibited from directly specifying that the pipeline owners were to bear the cost, § 60.102(a) of the Texas Water Code would *not* impose the cost on the Port because application of that provision is itself conditioned on the Port "requiring" the relocation and, as a matter of law, "the Port did not 'require' the relocation — the Corps did." (Pet. App. at 9a.)

A. The Fifth Circuit's Holding that Texas Law Would Not Impose the Cost of Removal on the Port Was Not Dicta

Petitioners attempt to play down the Fifth Circuit's dispositive resolution of the legal issue by also dismissing it in a footnote, asserting that the Fifth Circuit's decision on this issue is mere *dicta*. (Pet. at pg. 18 n.7.) This fundamentally mischaracterizes the Fifth Circuit's decision. The resolution of this issue was an alternative ground for the Fifth Circuit's judgment, and was in direct response to the issues framed by petitioners below. In their "Statement of Issues Presented for Review," to the Fifth Circuit, petitioners asserted that, the Court should resolve: "Whether under § 60.102(a) of the Texas Water Code, the Port must bear pipeline relocation costs required by the project at its sole expense." (*See Brief of Appellees and Cross-Appellants Air Liquide America L.P., et al. at pg. 2.*) The Fifth Circuit explicitly and properly resolved that issue in the negative.

This Court has long recognized that where an appellate court puts forth two alternative holdings in a decision, each broad enough to sustain the judgment, both holdings constitute the judgment of the court and are entitled to equal validity. *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924); *Woods v. Interstate Realty Co.*, 337 U.S.

535, 537 (1949); *see also Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 340 (1928). This is especially true when a positive decision on both issues is necessary to a judgment favorable to one of the parties before the appellate court. *Massachusetts v. United States*, 333 U.S. 611, 622-23 (1948) (concluding that "neither claim was either more or less essential to decision than the other, *indeed decision upon both was necessary to a judgment favorable to [petitioner]*" (emphasis added)).

This is precisely the case here. In order to prevail, the petitioners had to establish *both* that Congress expressly restricted the federal navigation servitude in WRDA-86, adopting the "rule" that state law must decide whether the local sponsor or the facility owner is to pay relocation costs, *and* that Texas law imposes that cost on the Port in this instance. The Fifth Circuit rejected each of those arguments. The fact that the Fifth Circuit resolved both of these independent issues in no way rendered the Fifth Circuit's discussion of either mere *dicta*. It is unclear whether petitioners are seeking review of the holding respecting the Texas Water Code. If not, then the petition should be denied because even if the Fifth Circuit were reversed on the issue of the navigation servitude its judgment would stand based on this alternative holding. If petitioners do intend for their petition to encompass a request for review of that holding, it should be denied because there is no basis in law or fact for reversing the holding.

B. Texas Law Does Not Impose the Cost of Removal of These Pipelines on the Port Because the Port *Did Not Require Their Removal*

Section 60.102(a) of the Texas Water Code provides that a district such as the Port must bear the expense of relocating utilities if the district has "requires" the relocation "in the exercise of the power conferred in [Subchapter E] or in the exercise of the power of eminent domain or the police power." This section does not purport to reach federal conduct and obviously cannot compel federal action. The Fifth Circuit properly held that § 60.102(a) was not triggered because Congress, acting through the Secretary of the Army, not the Port, required the owners to move their pipelines.

It was Congress, not the Port, that initiated the studies leading to the project; and it was Congress, not the Port, that authorized the Corps in WRDA-96 to undertake the Project. Finally, the specific demand requiring the owners to move their pipelines was contained in the notice to remove letters from the Corps. The petitioners cannot and do not deny that these letters required them to move their pipelines or face the consequences of having their federal permits revoked. These letters were not an exercise of any "power" of the Port—neither any power conferred by the Texas Water Code, nor the power of eminent domain, nor its police power. Without regard to whether the letters specified who should bear the expense of removal, the *requirement* that the pipelines be moved was an exercise of the federal power to regulate interstate commerce in conjunction with a federal navigation project. This fact is inescapable.

Nonetheless, petitioners continue to argue that Texas would impose the cost of removal on the Port because of the

Texas Water Code. The assertion is made that "[t]he issue, . . . never has been whether the Port had the authority to compel relocation — it does." This unsupported statement is simply wrong in every respect. First, in order to "require" the removal of the pipelines, within the meaning of the Texas Water Code, the Port has to be exercising one of the explicit powers granted to it. The Code is clear. Second, the power or authority to compel *these* pipelines to be moved was not granted to, but was specifically withheld from, the Port. When title to submerged lands was granted to the Port in 1927, the Texas Legislature explicitly gave the Port "the right, *power* and *authority* to abate and remove any and all encroachments or structures of any kind now or hereafter existing on said property, ***save such as may have been constructed under permit from the United States War Department, or other proper Federal Authority***[.]" Act of March 11, 1927, 40th Leg., R.S., ch. 292, 1927 Tex. Gen. Laws 437, 439 (emphasis added), found at 17R4395. Not only did the Port *not* require the owners to move their pipelines, since each of the lines was constructed under a proper federal permit, absent a voluntary agreement otherwise, the Port had no *power* or *authority* to do so.

It does not change the analysis to assert, as petitioners do, that the Port "importuned" the Corps to act, or treated it as a "partnership issue and decision." (Pet. pg. 7) The action of Congress or the Corps is not the action of the Port. The First Amendment to the United States Constitution protects the right to petition Congress and federal agencies. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136-38 (1961). Even if private citizens seek to inflict knowing injury upon the interests of another through legislation, the resulting act is protected if Congress acts within its power. *See id.* at 143-45. In short,

one may ask Congress to act, and if successful, it is congressional action that results, not individual action. Even if the Port sought the congressional authorization for a federal project that required the pipelines to be moved; having succeeded in obtaining that congressional action, it is ***Congress*** that "required" the removal of the pipelines, not the Port.

Finally, any request by the Port that the Corps exercise its Section 10 authority does not transform the Corps' action into action by the Port. The Port has no power to cause the Corps to honor the Port's request or to force the Corps to exercise its Section 10 authority. This Court has held specifically that there is no private right of action to enforce Section 10 of the Rivers and Harbors Act. *See California v. Sierra Club*, 451 U.S. 287, 297-98 (1981). When the Corps requires the removal of an obstacle to a navigable waterway, it is acting with the authority delegated to it by Congress. Absent a specific congressional directive, whether to enforce its Section 10 permit authority is within the discretion of the Corps, and the Port cannot compel it to act. *See Vieux Carre Prop. Owners Residents & Ass'ns, Inc. v. Brown*, 40 F.3d 112, 117 (5th Cir. 1994); *New York v. DeLyser*, 759 F. Supp. 982, 991 (W.D.N.Y. 1991). The Corps exercised its Section 10 permit authority, as delegated to it by Congress, and directed the pipeline owners to move their pipelines obstructing this congressionally authorized project. It is the Corps that exercised the congressional authority that "required" the removal of the pipelines — not the Port.

CONCLUSION

Each of the two independent holdings of the Fifth Circuit supports its judgment in this case. There are no mistakes of fact or misstatements of law underlying its holdings. Nor is there any conflict among the circuit courts of appeal on any issue raised by the petitioners. Ultimately, each of the reasons for review asserted by petitioners is based on a false premise, supported at best by a misunderstanding of the law. There being no basis in law or fact for further review of this case, respondent Port of Houston respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — WATER RESOURCES DEVELOPMENT ACT OF 1996

33 U.S.C. § 2201

SEC. 101. PROJECT AUTHORIZATIONS.

(a) PROJECTS WITH CHIEF'S REPORTS. — Except as provided in this subsection, the following projects for water resources development and conservation and other purposes are authorized to be carried out by the Secretary substantially in accordance with the plans, and subject to the conditions, described in the respective reports designed in this subsection:

* * *

(30) HOUSTON-GALVESTON NAVIGATION CHANNELS, TEXAS. — The project for navigation and environmental restoration. Houston-Galveston Navigation Channels, Texas: Report of the Chief of Engineers, dated May 9, 1996, at a total cost of $298,334,000, with an estimated Federal cost of $197,237,000 and an estimated non-Federal cost of $101,097,000, and an average annual cost of $786,000 for future environmental restoration over the 50-year life of the project, with an estimated annual Federal cost of $590,000 and an estimated annual non-Federal cost of $196,000. The removal of pipelines and other obstructions that are necessary for the project shall accomplished at non-Federal expense. Non-Federal interests shall receive credit toward cash

contributions required during construction and subsequent to construction for design and construction management work that is performed by non-Federal interests and that the Secretary determines is necessary to implement the project.

* * * *

APPENDIX B — TEXAS WATER CODE ANN. (Vernon 1988)

CHAPTER 60. NAVIGATION DISTRICTS—GENERAL PROVISIONS

SUBCHAPTER E. POWERS OF DISTRICTS FOR IMPROVEMENT OF PORT FACILITIES

§ 60.102. UTILITY RELOCATION

(a) If a district in the exercise of the powers conferred by this subchapter or in the exercise of the power of eminent domain or the police power requires the relocating, raising, lowering, rerouting, or changing in grade, or altering in the construction of any railroad, electric transmission line, telegraph or telephone line, conduit, pole, properties or facilities, or pipeline, the relocating, raising, lowering, rerouting, changing in grade, or altering of construction shall be done at the sole expense of the district.

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No. 04-14

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AIR LIQUIDE AMERICA L.P., *et al.*,

Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS and
PORT OF HOUSTON AUTHORITY OF
HARRIS COUNTY, TEXAS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF

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LIST OF PARTIES TO THE PROCEEDING BELOW AND DISCLOSURE STATEMENT FOR CORPORATE PETITIONERS

This information is set forth at page ii of the Petition for Writ of Certiorari, and there are no amendments to that Statement.

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REASONS FOR GRANTING THE PETITION

Owners' arguments go largely unaddressed in the Port's brief because the Port directs most of its effort toward redefining the main issue.

The main issue is whether the expansion of the constitutional navigational servitude accomplished by the Corps and the Fifth Circuit in this case is inappropriate and unwarranted. Owners contend that the power to secure removal of obstructions at no cost to the federal government does not – and should not – encompass authority to reallocate entirely non-federal expenses among non-federal parties.

The Port prefers to ask and answer a different question, framed as whether WRDA-86 waived the navigational servitude. *See* Br. in Opposition at i, 1, 9, 17, 20-21. The Port's steadfast refusal to acknowledge and address the real issue presented in the petition signals the absence of a ready answer.

I. The Issue Is The Servitude's Scope, Not Whether The Servitude Has Been Waived

At the same time it seeks to recast the issue, the Port also seeks to redefine the navigational servitude's scope. The Port wants to emphasize the federal government's authority to remove obstructions without acknowledging that this authority has limits.

"The navigational servitude defines the boundaries within which the government may supersede private

ownership interests to improve navigation." *Alameda Gateway, Ltd. v. United States*, 45 Fed. Cl. 757, 763 (1999) (citing *Owen v. United States*, 851 F.2d 1408, 1409 (Fed. Cir. 1988)). The servitude and the power that accompanies it are founded on Congress' constitutional authority "to regulate Commerce." *See* U.S. CONST. ART. I, § 8, cl. 3. This power, in turn, has been delegated to the Corps under the Rivers and Harbors Act of 1899, 33 U.S.C. § 401. Among other things, this power authorizes the federal government to order removal of navigational obstructions. *Gibson v. United States*, 166 U.S. 269, 271-72 (1897); *see also United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 62-63 (1913). Although broad, the navigational servitude's reach is not limitless and it is not coextensive with the Commerce Clause. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 172-73 (1979) ("While [a body of water] may be subject to regulation by the Corps of Engineers, acting under the authority delegated to it by Congress in the Rivers and Harbors Appropriation Act, it does not follow that the [regulated waterway] is also subject to a public right of access"); *see also Alameda Gateway, Ltd.*, 45 Fed. Cl. at 764.

The navigational servitude is "applied through the § 10 permits" issued to Owners by the Corps pursuant to 33 U.S.C. § 403 allowing construction of pipelines beneath the Houston Ship Channel. Pet. App. at 4a, 9a. "These § 10 permits provide . . . that pipelines and other structures beneath navigable waters are to be relocated ***at no expense to the United States*** if required by federal navigation interests or projects." *Id.* at 4a (emphasis added); *see also United Texas Transmission Co. v. United States Army Corps of Eng'rs*, 7 F.3d 436, 439 (5th Cir. 1993) ("*UTTCO*") (quoting from

provision of § 10 permit requiring owner to "remove or alter the . . . obstructions caused thereby ***without expense to the United States***") (emphasis added).

Under the Water Resources Development Act of 1986 ("WRDA-86"), Congress decreed that the United States would not bear responsibility for utility relocation costs. *See* 33 U.S.C. § 2211(a)(4) (local sponsor, rather than the United States, must "perform or assure the performance of all relocations of utilities necessary to carry out the project"). It follows that the relocation costs at issue are entirely non-federal under the circumstances of this case. The Fifth Circuit's judgment is erroneous because it expands the navigational servitude and bestows upon the Corps power to decide payment issues between non-federal parties when (1) the costs at issue are entirely and exclusively non-federal, and (2) the Owners have voluntarily performed the relocations to avoid delaying the project or creating extra costs. The Corps has never before had or claimed this power. Under WRDA-86 and the circumstances of this case, the Corps has nothing to say about allocating these non-federal costs.

The Port sidesteps this fundamental problem by redefining the issue as waiver of the navigational servitude. The Port variously asks whether Congress in WRDA-86 "implicitly waived" the navigational servitude (Br. in Opposition at 1, 9), "*restrict*[ed] the servitude" (*id.* at 9) (original emphasis), "'necessarily' decided to waive the servitude" (*id.* at 14), "waived the navigation[al] servitude" (*id.* at 17), "intended to waive the navigation[al] servitude" (*id.* at 20), "restrict[ed] the application of the servitude" (*id.*),

or "intended to withdraw the authority of the Corps to enforce its permits." *Id.* at 21. *See also id.* at i (rewriting issue presented to ask whether navigational servitude was "withdrawn" by WRDA-86).

In keeping with this theme, the Port also rewrites the Section 10 permits themselves by repeatedly omitting reference to removal of obstructions at "no expense to the United States." *See* Br. in Opposition at 9, 12, 20 n.7. The Port's preferred phraseology is to describe Section 10 authority as the power to require removal of "permitted facilities at [permittees'] . . . expense." *Id.* at 12. This is an incomplete description of the servitude and the permit. This sleight-of-hand does not work because power to compel removal of obstructions "at no expense to the United States" is ***not*** equivalent to power to compel removal at Owners' expense when, as here, the governing statute specifies that a non-federal entity must accomplish any such removals.

By allowing the Port and the Corps to use their "partnership" (12R3069) to reallocate non-federal expenses among non-federal entities, the Fifth Circuit effectively expands the navigational servitude's scope. That is the constitutional issue.

In restricting costs in WRDA-86, Congress did not "restrict" the navigational servitude. Rather, Congress made the navigational servitude a non-issue. No explicit or implicit waiver of the navigational servitude is necessary because the navigational servitude simply is not implicated when (1) the only relocation costs involved will be borne by entities other than the United States, and (2) the relocation has been undertaken timely so as not to interfere with the Corps' plans.

It is no answer for the Port to argue that WRDA-86 does not contain language waiving the navigational servitude. Waiver of the servitude is not the inquiry, and the Port's discussion of whether the servitude has been "waived" or "restricted" or "withdrawn" is not germane under the circumstances of this case.

The Port comes close to acknowledging the real issue in this case in footnote 7 of its brief, but this meager response falls short. A sweeping generalization that "imposition of the servitude virtually always implicates 'non-federal costs'" does not address the essential problem here because the costs in this case are by statute exclusively and entirely non-federal. From there, the Port veers off again and argues that a "waiver" is required if "WRDA-86 restricts the application of the servitude." *Id.* This is merely another effort to redefine the issue. As explained above, WRDA-86 does not "restrict" the navigational servitude. WRDA-86 restricts the costs at issue in such way as to make them entirely non-federal, and thereby renders the navigational servitude immaterial because invocation is not necessary to (1) avoid federal expense, or (2) compel relocation of utilities left in place by a recalcitrant private owner so as to avoid disruption of a Corps project.

Also unavailing is the Port's belated effort to manufacture federal costs arising from the utility relocations at issue. *See* Br. in Opposition at 21 & n.8. The Port speculates about the potential for "some tens of millions in additional costs to the federal government" but fails to proffer any record cite to support this assertion. Presumably, if "tens of millions in additional costs" existed and were capable of estimation, the Port would have provided such numbers to the trial court

and would be able to provide record cites for this Court. Utter speculation of this nature fails to establish that the costs at issue in this case are anything other than entirely non-federal.

The Port cannot camouflage the gaps in the Fifth Circuit's judgment by pointing to the decision in *UTTCO*. As the Port acknowledges, *UTTCO* addressed neither WRDA-86 nor a congressional mandate for the local sponsor to "perform or assure the performance of" utility relocations. *See UTTCO*, 7 F.3d at 438-40. *UTTCO* addressed the Corps' right to take action against an owner who refused to relocate, which meant that "the flood control project was delayed by UTTCO's unflagging refusal to relocate its pipelines. . . ." *Id.* at 439. No such issue is presented in this case. As the Fifth Circuit suggested should have been done in *UTTCO*, the Owners acted appropriately in this case by relocating first and then pursuing legal remedies for reimbursement. *See id.* at 447.

The Port's reliance on *United States v. Alameda Gateway Ltd.*, 953 F. Supp. 1106 (N.D. Cal. 1996), fails for the same reason. That case too focused on the Corps' authority to seek relief against a recalcitrant property owner who refused to relocate impediments to navigation. *See id.* at 1110. Moreover, the Port cannot properly analogize the language in 33 U.S.C. § 2211(a)(4) to the Project Cooperation Agreement discussed in *Alameda Gateway*. The contract-based contentions of the property owner in *Alameda Gateway* were rejected because the property owner lacked standing to enforce any contractual obligations between the Corps and the City of Oakland, and because the general contract language did not specifically address the piers at issue in that dispute. 953 F. Supp. at 1113-14.

Contractual considerations such as those discussed above obviously do not apply in the context of addressing the scope and effect of 33 U.S.C. § 2211(a)(4). Therefore, both *UTTCO* and *Alameda Gateway* are inapposite to the extent they discussed cooperation agreements between the Corps and local governments against the backdrop of a recalcitrant property owner's refusals to cooperate resulting in project delay. *See UTTCO*, 7 F.3d at 439 & n.3; *Alameda Gateway Ltd.*, 953 F. Supp. at 1113-14.

II. Neither WRDA-86's Terms Nor Its Legislative History Help The Port

The Port's effort to inject ambiguity into 33 U.S.C. § 2211(a)(4) is unavailing. *See* Br. in Opposition at 13. The statute need not expressly reference "costs" in order to make clear that no federal costs are involved. When the statute directs that "[t]he non-federal interests . . . shall perform or assure the performance of all relocations of utilities necessary to carry out the project . . . ," the statute takes the Project beyond the realm of federal costs. Congress did not say who had to pay; instead Congress confined itself to saying who did ***not*** have to pay – the United States. By expressly and unambiguously stating that the United States is not responsible for utility relocations, WRDA-86 makes clear that the decision as to who must pay for such relocations will be determined by a mechanism outside of the navigational servitude.

The Port also fails in its effort to argue that reference to legislative history always is foreclosed in the absence of statutory ambiguity. *See* Br. in Opposition at 14. This

contention is, at best, overstated. *See, e.g., United States v. Romani*, 523 U.S. 517, 533-34 (1998); *Conroy v. Aniskoff*, 507 U.S. 511, 514-18 (1993). To the extent that the Port wishes to rely upon Senate Report No 99-126 despite its disdain for legislative history, that reliance is misplaced. *See* Br. in Opposition at 16. This report predated the conference report by at least a year, and it addressed a Senate bill that ultimately was abandoned in favor of an amended House bill. *See* S. REP. NO. 99-126.

III. This Case Does Not Present Alternative State-Law Grounds For Affirmance

The Port's effort to identify alternative state-law grounds for affirmance founders on the Fifth Circuit's repeated and emphatic statements relying exclusively upon the navigational servitude to decide the case. *See* Pet. App. at 4a (Texas law does *not* control) (original emphasis); *see also id.* at 9a ("In any event TEX. WATER CODE § 60.102 does *not* apply. First, to trigger that section's application the Port had to 'require' the relocation. It did not (and cannot) do so") (original emphasis); *id.* ("This provision is not applicable because the Port did not *require* the relocation – the Corps did") (original emphasis); *id.* at 10a ("By requiring removal of an obstacle to a navigable waterway, the Corps was acting pursuant to power delegated to it by Congress. It was pursuant to this power, not the Port's request, that the Corps required the relocation"); *id.* at 11a ("the Corps not the Port, required Owners to relocate their pipeline").

In light of these statements, the Port cannot credibly argue that application of Section 60.102 "was an alternative

ground for the Fifth Circuit's judgment." *See* Br. in Opposition at 22. The Fifth Circuit says otherwise.

IV. The Port Fails To Address Or Join Issue On *Solid Waste Agency*

The Port neither discusses nor cites this Court's decision in *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159 (2001). This omission is telling because it suggests that the Port has no response to two main points apparent in *Solid Waste Agency*: (1) without regard to the existence or absence of a circuit split, certiorari is warranted when the Corps pushes the outer limits of constitutional and congressionally granted authority; and (2) courts should be "loathe to replace the plain text and original understanding of a statute" with an amended and inconsistent agency interpretation. *See id.* at 168-70 & n.5, 172-73.

Here, the Fifth Circuit's judgment defers to the Corps' invocation of its navigational servitude when only non-federal costs are at issue, and it does so in the face of a prior inconsistent Corps interpretation of that same power. *See* Pet. for Writ of Certiorari at 6-7, 14, 25-26. As in *Solid Waste Agency*, intervention by the Supreme Court is warranted here.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted. The judgment of the court of appeals should be reversed, and this matter should be remanded to the court of appeals for further consideration.

Respectfully submitted,

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